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In The

Supreme Court of the United States

October Term, 1998

NATIVE VILLAGE OF EYAK,
NATIVE VILLAGE OF TATITLEK,
NATIVE VILLAGE OF CHANEGA (aka CHENEGA),
NATIVE VILLAGE OF NANWALEK, and
NATIVE VILLAGE OF PORT GRAHAM,

Petitioners,

v.

WILLIAM M. DALEY,
SECRETARY OF COMMERCE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "federal paramountcy doctrine" bars Alaska Native Tribes from holding aboriginal title to their hunting and fishing grounds on the Outer Continental Shelf (OCS) even though Congress, which has the sole power to extinguish aboriginal title, has expressly preserved such rights in every major piece of legislation applicable to the OCS.

PARTIES TO THE PROCEEDING

Petitioners

Native Village of Eyak, Native Village of Tatitlek, Native Village of Chanega (aka Chenega), Native Village of Nanwalek, and Native Village of Port Graham.

Respondents

William M. Daley, Secretary of Commerce.

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PETITION FOR A WRIT OF CERTIORARI

The Native Villages of Eyak, Tatitlek, Chanega (aka Chenega), Nanwalek, and Port Graham petition for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Ninth Circuit opinion is reported at 154 F.3d 1090 and reprinted in the Appendix hereto ("App.") at 1. That opinion affirmed the order of the District Court for the District of Alaska, which is unreported and reprinted at App. 19.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1998. App. 1. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on December 7, 1998. App. 63. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) of 1976, as amended, 16 U.S.C. 1801 *et seq.*, the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. 1331 *et seq.*, and the Submerged Lands Act of 1953, 43 U.S.C. 1301 *et seq.*, are reprinted at App. 65-69.

INTRODUCTION

This case presents an issue of extraordinary importance to over fifty Alaska Native Villages, all of which are federally recognized tribes. It involves a dispute between the five petitioner tribes and the federal government over the basic question whether tribes can hold aboriginal title, including exclusive fishing rights, to their traditional hunting and fishing grounds on the Outer Continental Shelf (OCS) of Alaska. The dispute arises from Department of Commerce regulations that prohibit tribal members from fishing for halibut and sablefish (black cod) within their aboriginal hunting and fishing grounds, while allowing third parties to do so. It turns on whether the "federal paramountcy doctrine" precludes aboriginal title, including exclusive fishing rights, on the OCS.

Aboriginal title arises from long term exclusive use and occupancy by a Native tribe. Long term exclusive hunting or fishing satisfies this use and occupancy requirement. Petitioners have exclusively hunted the marine mammals and harvested the fishery resources within their traditional territories of the OCS since time immemorial and are dependent on such resources today.

In an opinion that effectively overturns an earlier decision of that court, the Ninth Circuit held that federal paramountcy precludes the tribes' aboriginal title claims. The paramountcy doctrine arose from a series of cases decided by this Court which recognized the paramount rights of the United States in the territorial sea and OCS, while rejecting the claims of various coastal states to ownership and control of the adjacent sea. The Court rejected the States' claims on the ground they might

interfere with the federal government's external sovereign powers over foreign affairs, foreign commerce, and national defense. The court below erroneously concluded that the aboriginal claims of the tribes in this case were indistinguishable from the States' claims and would likewise conflict with federal paramountcy. In reaching this conclusion, the court overlooked three critical distinctions between the tribes' claims here, and the States' claims in the paramountcy cases. First, aboriginal rights cannot conflict with the federal government's paramount powers because Congress has plenary power over Indian affairs and can extinguish aboriginal rights at any time, for any reason, and without compensation; Congress possesses no comparable power to extinguish or divest state property rights. Second, Congress has the power to terminate a tribe's governing powers over its aboriginal territory, but possesses no comparable power to extinguish state governing powers. Third, and most important, the tribes' aboriginal rights claims have been expressly protected by Congress, whereas the States' claims in the paramountcy cases had not.

The Ninth Circuit's conclusion that aboriginal rights in the OCS are barred amounts to a judicial extinguishment of those rights. As such, it is unprecedented. Indeed, the doctrine of aboriginal title *presumes* federal paramountcy. Aboriginal rights fall under the protection of federal law as soon as federal jurisdiction is extended to a new territory occupied by Natives.[1] Far from eroding

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[1] *See, e.g., Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872) (Florida Cession Treaty); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835) (Florida Cession Treaty); *United States v. Santa Fe Pac.*

federal sovereignty, the decision to respect aboriginal title is *an exercise* of federal power and federal policy adhered to since the earliest days of the Republic. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 669 (1974). This Court has recognized aboriginal title in every new territory over which the United States has extended its jurisdiction, including Alaska. In 1953, when the United States again extended its jurisdiction, this time to the OCS, Congress expressly recognized and confirmed pre-existing rights – including aboriginal fishing rights – in this new territory. Thus, the Ninth Circuit's opinion not only effectively reverses 200 years of federal Indian law without authority or justification, it violates the explicit will of Congress.

This decision has enormous consequences for over fifty Alaska tribes whose members continue a subsistence way of life and are heavily dependent upon the fish and wildlife resources of the OCS. The social, cultural, and economic well-being of these small, isolated, off-the-road-system villages, depends on the ability of their members to continue to hunt and fish in their traditional territories of the OCS. Although the IFQ regulations currently cover only halibut and sablefish, expansion to other species has already been considered.[2] Thus, if permitted to stand, the Ninth Circuit's decision will lead to the destruction of

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R.R. Co., 314 U.S. 339, 345-47 (1941) (Mexican Cession Treaty); *Tee-Hit-Ton*, 348 U.S. 272, 279-85 (1955) (Alaska Cession Treaty).

[2] Clarence Pautzke and Chris Oliver, *Development of the Individual Fishing Quota Program for Sablefish and Halibut Longline Fisheries off Alaska* at 8 (Pacific cod and rockfish), 19 (groundfish and crab), 20 (Bering Sea and Aleutian pollock) (1997).

one of the last marine-based subsistence cultures in North America.

The decision below, moreover, comes like a bolt from the blue. It contravenes the clear intent of Congress in the Magnuson-Stevens Act, the Outer Continental Shelf Lands Act (OCSLA) and the Submerged Lands Act (SLA). It breaks ranks with the Ninth Circuit's earlier decision in *Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989), which expressly held that "aboriginal rights may exist concurrently with a paramount interest, *without* undermining that interest." *Id.* at 1277 (emphasis added). And it completely ignores the views of the Department of the Interior – the agency charged with overseeing all Indian affairs, 25 U.S.C. 2 – which, in an exhaustive opinion during Felix Cohen's tenure at Interior, categorically concluded that Alaska Natives hold exclusive aboriginal fishing rights in the marine waters of Alaska. *Aboriginal Fishing Rights in Alaska*, 57 Interior Dec. 461, 462-63 (1942). Before over fifty Alaska tribes are denied their birthright in violation of the express intent of Congress, this Court should grant the writ and address the threshold question presented.

STATEMENT OF THE CASE

Petitioners are located in the Prince William Sound and lower Cook Inlet areas of Alaska, where their members have exclusively hunted sea mammals and harvested the fishery resources of the OCS for more than 7,000

years,[3] including halibut, black cod, scallops, red salmon, king salmon, chum salmon, silver salmon, dungeness crab, bairdi crab, gray cod, razor clams, and octopus. *Id.* CR 35, Ex. 3 at 1-2; CR 60 at 3, 6. Their long-term use of the OCS predating the assertion of federal sovereignty endows them with aboriginal title to their traditional hunting and fishing grounds. Dependent upon rather than adverse to assertions of paramount federal sovereignty, these rights are reserved and confirmed by the extension of the sovereign power of the United States over an area, unless and until Congress "clearly and unambiguously" provides otherwise. *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 346 (1941).

In Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 555 (1987), this Court vacated the Ninth Circuit's judgment holding "that Section 4(b) [of] the Alaska Native Claims Settlement Act [of 1971 (ANCSA) 43 U.S.C. 1601-1642)] extinguished aboriginal rights on the OCS," and remanded that question for reconsideration.[4] On remand the Circuit Court construed ANCSA consistently with the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), 16 U.S.C. 3101 *et seq.*, and held that ANCSA did not extinguish aboriginal title claims to the

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[3] Second Amended Complaint, CR 60 at 3 (CR references are to District Court Docket Control Nos.); Motion for Partial Summary Judgment, CR 35 at 2, n. 1, Exhibits 1, 2, and 3.

[4] Because the ANCSA provision that extinguished aboriginal rights did so only "in Alaska," and that same term in the Alaska National Interests Conservation Act did not include the OCS, this Court directed the Ninth Circuit to reconsider whether the phrase "in Alaska" in ANCSA included the OCS. *Id.* at 546-55.

OCS, nor did federal paramountcy preclude them. *Village of Gambell v. Hodel* (*Gambell III*), 869 F.2d 1273, 1277, 1280 (9th Cir. 1989).[5]

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[5] The court below attempts to distinguish *Gambell III* on the ground that the *Gambell* plaintiffs limited their claims to *nonexclusive* rights which did not conflict with federal paramountcy. App. 1 at 13, 14. While the *Gambell* plaintiffs limited their claims to aboriginal fishing rights, as distinguished from aboriginal title, they did not limit their claims to nonexclusive rights. Because *all* aboriginal rights are, by definition, exclusive, it is only reasonable to assume that the aboriginal fishing rights which *Gambell III* held did not conflict with federal paramountcy, were likewise exclusive.

Gambell III drew no distinction between exclusive and nonexclusive rights. It never even mentions them. The question of exclusive/nonexclusive fishing rights had simply never been an issue in *Gambell* because there were no competing claims to the fishery. Rather, it was the *Gambell* tribes' *late* claims to aboriginal "title," which included beneficial ownership of the oil and gas resources of the OCS, that caused the court subsequently to refuse to hear their aboriginal *title* claims, while permitting their aboriginal fishing claims to proceed. *Village of Gambell v. Babbitt*, 999 F.2d 403 (9th Cir. 1993) (*Gambell IV*). The *Gambell IV* panel simply refused to permit the villages to "recast" their case into one claiming ownership of the minerals "at this late date." *Id.* at 407.

In short, the decision below cannot be reconciled with *Gambell III*'s conclusion that aboriginal fishing rights in the OCS *can* "exist concurrently with a paramount federal interest, without undermining that interest," 869 F.2d 1277, or with *Gambell IV's* reiteration of this conclusion that: "the federal government's paramount interests in the Outer Continental Shelf did not extinguish the aboriginal rights of the villages," 999 F.2d 405.

Following the passage of ANCSA, in 1976 Congress enacted the Magnuson Fishery Conservation and Management Act (renamed the Magnuson-Stevens Act when amended on October 11, 1996), 16 U.S.C. 1801-1882. The Magnuson-Stevens Act extended sovereign control and jurisdiction of the United States to waters lying between 3 and 200 miles off the coast by establishing an exclusive fishery conservation zone and asserting "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone (EEZ)." 16 U.S.C. 1811 (1997). Congress expressly prohibited the Secretary from implementing the Act to conflict "with any other applicable law," 1854(c)(1) and 1854(a)(3), and directed that the Act "not be construed, in any way, to affect or change" the fishing rights of Native Americans, whether established by treaty or "any other applicable decision." S.Rep. No. 94-416, at 692 (1975).

In 1993, pursuant to the Magnuson-Stevens Act and the Northern Pacific Halibut Act of 1982 (Halibut Act), 16 U.S.C. 773-773k, the Secretary of Commerce promulgated regulations limiting access to the sablefish (black cod) and halibut fisheries in the Gulf of Alaska and lower Cook Inlet. 58 Fed. Reg. 59,375, *codified at* 50 C.F.R. 676 (1995). The basic regulatory scheme provides that any boat that fishes commercially for sablefish or halibut in the regulated area must have an individual fishing quota (IFQ) share permit, specifying the vessel's maximum fishing harvest. 50 C.F.R. § 676.13(a). The regulated area consists of portions of the Gulf of Alaska which encompass the petitioners' aboriginal hunting and fishing grounds on the OCS. 50 C.F.R. § 676.10(b); CR 60 at 6.

Only those individuals with IFQ permits may commercially harvest halibut and sablefish (black cod). *See Alliance Against IFQs v. Brown*, 84 F.3d 343 (9th Cir. 1996).

Although a few of the petitioners' members possess individual fishing quotas (IFQs) which authorize them to commercially fish for halibut and sablefish, the vast majority do not. App. 19 at 21. As a result, they are barred from commercially fishing for halibut and sablefish within their aboriginal fishing grounds. The same regulations authorize nontribal members who possess IFQs to commercially fish within the tribes' traditional fishing grounds.

In addition, Department of Commerce regulations prohibit the noncommercial harvest of sablefish, which means that petitioners' members are even prohibited from subsistence fishing for sablefish for their own consumption. Moreover, all of petitioners' members are restricted by *non*commercial halibut fishing regulations, to fishing for halibut for subsistence with inefficient gear (a hook and line, with no more than two hooks) and unreasonable bag limits (two fish per day). 50 C.F.R. §§ 301.17(a), 301.21(a) and (b).

On May 17, 1995, the petitioners filed an amended complaint in this case seeking to establish their aboriginal title, including exclusive fishing rights, to their traditional territories on the OCS and to enjoin the Secretary of Commerce from violating those rights. On cross-motions for summary judgment, the district court rejected the Secretary's contentions that the petitioners' aboriginal rights were extinguished by OCSLA, the Russian government, or the statute of limitations (App. 19 at 59, 60), but

granted the Secretary's motion for dismissal on the grounds that federal paramountcy precludes aboriginal title in the OCS (*id.* at 61), and that common law property precepts preclude exclusive aboriginal fishing rights in navigable waters. *Id.*[6]

On appeal the Ninth Circuit agreed that federal paramountcy barred petitioners' claims and consequently declined to rule on the district court's alternative holding based on common law property precepts involving navigable waters.[7] App. 1 at 17. Relying on the "paramountcy cases," the Ninth Circuit rejected the tribes' claims as contrary to the federal government's paramount interests in the adjacent sea. App. 1 at 17.

The paramountcy cases involved disputes between the federal government and four coastal states over competing and mutually exclusive claims of ownership and control of the territorial sea and the OCS. In *United States v. California*, 332 U.S. 19, 22 (1947), the federal government sought to enjoin the State of California from claiming ownership of oil, gas, and other minerals in the territorial sea. The issue before the court was,

> whether the state or federal government has the paramount right and power to determine in the

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[6] The district court asserted that the common law did not preclude nonexclusive aboriginal fishing rights in navigable waters, but expressly declined to decide what, if any, "nonexclusive" fishing rights the tribes might have in the OCS or whether such rights would conflict with "federal paramount interest[s]." App. 19 at 28, 59.

[7] The Ninth Circuit also declined to rule on whether Petitioners' challenge to the sablefish regulations was barred by the statute of limitations.

> first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea . . . may be exploited.

Id. at 29. The Court rejected California's claim on the ground that it conflicted with the "national external sovereignty" of the United States. *Id.* at 34. According to the Court in *California*, the federal government must possess ownership and paramount authority over the adjacent sea, because state ownership and control would conflict with the government's external powers over foreign affairs, foreign commerce, and national defense. *See United States v. California*, 332 U.S. at 38-39. *See also United States v. Louisiana*, 339 U.S. 699, 704 (1950); *United States v. Texas*, 339 U.S. 707, 718 (1950); *United States v. Maine*, 420 U.S. 515, 522 (1975).

While acknowledging that nonexclusive Native fishing rights in the OCS may be permissible, the Ninth Circuit erroneously concluded that the exclusive fishing rights claimed by the tribes were indistinguishable from the claims of the States and would likewise interfere with the government's paramount interests. App. 1 at 14, 15.

REASONS FOR GRANTING THE WRIT

I. THE JURISDICTIONAL QUESTIONS PRESENTED ARE EXTRAORDINARILY IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

It is difficult to overstate the importance of this case. Its geographic magnitude, to begin with, is enormous. Although the Ninth Circuit's decision directly involves

only five Alaska Native Villages, it effectively extinguishes the aboriginal rights of over fifty coastal Villages, all federally recognized tribes, from Barrow in the north, to Metlakatla in the South – a distance exceeding the coastlines of the lower 48 states combined. Although the aboriginal fishing areas of the individual tribes cover only a small fraction of the OCS, *together* they encompass huge fishing grounds presently managed by the Secretary. Their geographic magnitude alone is a compelling reason to grant the writ. In *Andrus v. Utah*, 446 U.S. 500, 506 (1980), the Court explained that it granted certiorari "[b]ecause the dispute between the parties involves a significant issue regarding the disposition of vast amounts of public lands." The "vast amounts" of land involved in that case comprised some 571,000 acres, *id.* at 506 n. 6 – a fraction of the OCS acres at issue in this case. *See also Andrus v. Idaho*, 445 U.S. 715, 722 (1980) (certiorari granted to resolve the status of "some 2.4 million acres of desert land within Idaho"); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 42 (1983) (certiorari granted "[i]n view of the importance of the case to the administration of . . . more than 33 million acres of land").

Even more significant than the geographic breadth of this case, is the fact that the decision below directly impacts the authority of the Tribes *and the Commerce Department* to manage the fisheries in substantial areas of the OCS. Within Indian Country Tribes may exercise their hunting and fishing rights free of federal regulation unless and until Congress "plain[ly] and unambiguous[ly]" provides otherwise. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346 (1942). Also, within Indian Country tribes possess the power to govern not only their

own members, but also their aboriginal territory, including the authority to regulate hunting and fishing. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-332 (1983). A territory to which aboriginal title has not been extinguished is Indian Country. *Bates v. Clark*, 95 U.S. 204, 208 (1877). Indian Country is the jurisdictional touchstone for delineating federal, state, and tribal authority over Indian-occupied lands. *See Alaska v. Venetie*, 118 S. Ct. 948 (1998), *Narragansett Indian Tribe v. Narragansett Elec. Co.*, 89 F.3d 908, 915 (1st Cir. 1996); Cohen, *supra*, at 27.

Here, this means that the tribes would be free to fish within their aboriginal fishing grounds without Individual Fishing Quotas or other licenses or permits and without restrictions on their gear, seasons, or catch limits, *unless and until* Congress imposes such restrictions. Congress, of course, can extinguish aboriginal title. Until it does, however, Tribes retain their aboriginal rights; and such rights are entitled to the protection of federal law just as tribal rights based on treaties or statutes. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 669 (1974) (*Oneida I*); and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*) ("no one [can] . . . terminate aboriginal title without the consent of the sovereign"); Cohen at 443; Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28 (1947). Moreover, and of critical importance here, aboriginal rights, which are *not* vested as against congressional action, *are* protected and enforceable against third parties, *including Executive Branch officials* such as the Secretary of Commerce, who violate such rights without the authorization of Congress. *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 360 (1941) (Secretary of Interior could not deprive the Walapai Indian tribe

of their aboriginal title); *Cramer v. United States*, 261 U.S. 219, 235 (1923) ("no officer or agent of the government . . . [could] deprive the Indians of their rights" absent congressional authorization).[8]

II. THE NINTH CIRCUIT'S HOLDING THAT FEDERAL PARAMOUNTCY PRECLUDES ABORIGINAL TITLE IN THE OCS CONFLICTS WITH THE CLEAR INTENT OF CONGRESS IN THE MAGNUSON-STEVENS ACT, THE OUTER CONTINENTAL SHELF LANDS ACT, THE SUBMERGED LANDS ACT, AND THE OPINION OF THE FEDERAL AGENCY CHARGED WITH OVERSEEING ALL INDIAN AFFAIRS.

Inexplicably, the court below completely ignored the fact that the tribes' claims here have been expressly protected by Congress, whereas the States' claims in the

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[8] *See also Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152 (9th Cir. 1988) (Secretary's conflicting duties do not allow him to compromise or ignore Indian rights); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (Secretary cannot ignore the Nonintercourse Act which imposes a fiduciary duty on him to protect lands covered under the Act); *United States v. Fort Sill Apache Tribe of Oklahoma*, 533 F.2d 532, 538 (Ct. Cl. 1976) (government officials who sanction or condone trespass and removal of minerals from aboriginal lands are liable for damages); *Edwardsen v. Morton*, 369 F.Supp. 1359, 1375 (D.C. 1973) ("federal officers are obligated to protect aboriginal lands against intrusion by third parties until such time as Congress acts to extinguish possessory rights therein."); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.C. Cir. 1972) (Secretary is obligated to formulate a closely developed regulation that would preserve water for the tribe upon which their fishing rights depend).

paramountcy cases had not. Ultimately, Congress has the last word in determining what nonfederal interests in the OCS offend federal paramountcy. Thus, Congress can determine what mineral or fish and wildlife resources of the OCS may be owned or exploited by nonfederal interests and how such resources may be allocated and managed. And when Congress grants or preserves rights in the adjacent sea, its word is final. *United States v. Maine*, 420 U.S. 515, 524-525 (1975). That Congress has the final say is graphically demonstrated by the Submerged Lands Act of 1953, 43 U.S.C. 1301-1315, which gave the coastal states ownership of the seabed and mineral resources of the Territorial Sea, thereby effectively reversing this Court's earlier conclusion in the paramountcy cases, that such state ownership would conflict with the paramount powers of the federal government.

Here the Secretary's authority to regulate fishing in the OCS is based primarily on the Magnuson-Stevens Act, 16 U.S.C. 1801-1854, yet the Ninth Circuit's opinion utterly overlooks the fact that this Act expressly protects pre-existing rights in the OCS, *including Native fishing rights*. Sections 1854(c)(1) and 1854(a)(3) prohibit the Secretary from implementing the Act in such a way as to conflict "with any other applicable law." The protection of aboriginal rights has been a part of the common law of the United States for over 200 years. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543, 545 (1832). Indeed, the Ninth Circuit, itself, has held that Indian fishing rights fall within the purview of "other applicable law" and thus are protected by the Magnuson-Stevens Act. *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996).

The legislative history of the Magnuson-Stevens Act confirms Congress' intent to preserve Native fishing rights. The Senate Committee report explicitly provides that the Act "should not be construed, in any way, to affect or change" the fishing rights of Native Americans, whether established by "treaty" or "any other applicable decision." S. Rep. No. 94-416, at 692 (1975). Aboriginal fishing rights have been recognized in numerous cases, including decisions of this Court. *See, e.g., United States v. Winans*, 198 U.S. 371, 381 (1905) (river waters); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 678-81, 688 (1979) (ocean waters off the Pacific Northwest Coast); *Damon v. Hawaii*, 194 U.S. 154, 157-58 (1904); and *Carter v. Territory of Hawaii*, 200 U.S. 255, 256-57 (1906) (sea waters off the coast of Hawaii).[9]

Even before the Magnuson-Stevens Act, Congress acted to protect aboriginal rights in the OCS when it extended United States' sovereignty to the OCS in the OCSLA, 43 U.S.C. 1331-1356. The OCSLA asserts federal jurisdiction and control over submerged lands in the OCS beyond state boundaries. Concurrent with this sweeping assertion of sovereign power, Congress expressly provided that the newly acquired interests of the United States would be subject to pre-existing rights. Section 14

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[9] *See also United States v. Michigan*, 471 F.Supp. 192, 256 (W.D. Mich. 1979), *remanded on other grounds*, 623 F.2d 448 (6th Cir. 1980), *decree mod.*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981) (Michigan tribes possess aboriginal title, including aboriginal fishing rights to huge portions of the Great Lakes); *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1983), *cert. denied sub nom. Oregon v. United States*, 467 U.S. 1252 (1984).

states that OCSLA should not be interpreted to "affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to" its provisions. 43 U.S.C. 1342. Confirming this plain language, the legislative history shows that Congress intended to protect all pre-existing rights, *including aboriginal rights*:

> [The Act] asserts Federal jurisdiction and control over the Continental Shelf areas beyond original State boundaries, thus bringing the lands and resources within such areas into *the same legal status as those acquired by the United States through cession or annexation; in the alternative, such lands and resources are subject to the doctrine of discovery*. Adherence to the policy heretofore observed in connection with similar lands and resources brought under national dominion requires, as a matter of policy and law, that the property rights of individuals in and to such lands and resources be recognized and confirmed.

H. Rep. No. 82-695 (1953), *reprinted in* 1953 U.S.C.C.A.N. 1395, 1411 (emphasis added). This Court has recognized aboriginal title in every territory which the United States has acquired by "cession or annexation," including Alaska. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 275 (1955).[10]

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[10] *See Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835) (First Florida Cession Treaty); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872) (Second Florida Cession Treaty); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345-47 (1941) (Mexican Cession Treaty).

If there were any remaining doubt, Congress' intent to include aboriginal rights within the savings clause is conclusively demonstrated by the Report's reference to the "doctrine of discovery" which has been the legal rationale upon which the recognition and protection of aboriginal rights in the United States has been based since the Declaration of Independence. *Oneida Indian Nation*, at 667-672; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543-545 (1832).[11] Thus, Congress has determined that aboriginal rights do *not* conflict with the paramount authority of the United States; indeed, they are *authorized* by the United States.

Nor can these savings clauses be dismissed as having no bearing on the question of federal paramountcy. Such a construction could not be squared with the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Oregon Rev. Dept. v. ACF Industries*, 510 U.S. 332, 340-41 (1994) (quoting *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)). *See also Bennett v. Spear*, 520 U.S. 154, 173 (1997) (it is a cardinal principle of statutory construction, "to give effect, if possible, 'to every clause and word of a statute' . . . rather than to emasculate an entire section."); *Kungys v. United States*, 485 U.S. 759, 778 (1988) ("no provision should be construed to be entirely redundant"). If all nonfederal rights in the adjacent sea were automatically barred by federal paramountcy, there would have been no need for the savings clauses because there would have been no "pre-

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[11] The Submerged Lands Act contains the identical savings clause. *See* 43 U.S.C. 1315.

existing rights" to protect. Thus, Congress' explicit efforts to protect such rights in the SLA, the OCSLA, and the Magnuson-Stevens Act would have been for naught. Such an interpretation would not only violate the canons of construction, it could not be squared with the legislative history of the OCSLA which explicitly states that Congress intended, not merely to refrain from extinguishing pre-existing rights, *but to positively "recognize [ ] and confirm"* them.

> Adherence to the policy heretofore observed in connection with similar lands and resources brought under national dominion requires, as a matter of policy and law, that the property rights of individuals in and to such lands and resources be *recognized and confirmed.*

H. Rep. No. 82-695 (1953), *reprinted in* 1953 U.S.C.C.A.N. 1395, 1411 (emphasis added).

For over two hundred years it has been the national policy of this country to recognize and protect aboriginal rights in every territory over which the United States has extended its sovereignty, including Alaska. Congress has now determined that this policy should be extended to the OCS. Accordingly, even if the Tribes' aboriginal rights might conceivably have conflicted with the government's paramount authority over the OCS, that theoretical possibility was erased when Congress expressly preserved the Tribes' pre-existing rights in the OCSLA, the SLA, and the Magnuson-Stevens Act, thereby effectively determining – as a matter of law – that such rights do not conflict with federal paramountcy.

The Ninth Circuit's decision also conflicts with the opinion of Department of the Interior, which has

expressly concluded that Alaska Natives can hold exclusive aboriginal fishing rights in the marine waters of Alaska. *Aboriginal Fishing Rights in Alaska,* 57 Interior Dec. 461, 462-63 (1942). In a well-reasoned opinion issued during the Felix Cohen era at Interior, the Solicitor found "that available information shows that the Indians clearly recognized *inter se,* . . . exclusive rights to take fish in designated waters" and concluded that "unless [such rights] . . . have been modified under Russian or American sovereignty . . . the aboriginal rights of the Indians continue in effect." *Id.* at 462-63.

Coming from the federal agency charged with overseeing all Indian affairs, 25 U.S.C. 2 – that interpretation is entitled to "considerable deference." *Andrus v. Idaho,* 445 U.S. 715, 729 (1980). *Accord National R.R. Passenger Corp. v. Boston & Maine Corp.,* 503 U.S. 407, 417 (1992). Tellingly, the Ninth Circuit not only declined to accord the Department's interpretation any deference; it completely ignored it.

III. THE NINTH CIRCUIT'S HOLDING CONFLICTS, IN PRINCIPLE, WITH DECISIONS OF THIS COURT.

The Ninth Circuit's conclusion that aboriginal rights are precluded in the OCS also conflicts in principle with decisions of this Court. This Court held early on that "the nature of Indian title . . . is not such as to be . . . repugnant to seisin in fee on the part of the state." *Fletcher v. Peck,* 10 U.S. (6 Cranch.) 87, 142-43 (1810). Since then the Court has repeatedly held that *federal* title and *aboriginal* title are perfectly compatible. *Oneida II,* 470 U.S. at

233-36; *United States v. Shoshone Tribe*, 304 U.S. 111, 116-18 (1938). Far from eroding federal sovereignty, the decision to respect aboriginal title *is an exercise of federal power* and of federal policy. *Oneida I*, 414 U.S. at 669.

Federal powers are no less paramount and no less at risk in land areas over which the United States has extended its jurisdiction, particularly areas adjacent to foreign countries. Yet, aboriginal title claims have uniformly been upheld in such areas, including the Louisiana Purchase. *See United States v. Turtle Mountain Band of Chippewa*, 612 F.2d 517 (Ct. Cl. 1979); *see also Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872) (Florida Cession Treaty); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835) (Florida Cession Treaty); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345-47 (1941) (Mexican Cession Treaty); *Tee-Hit-Ton*, 348 U.S. 272, 279-85 (1955) (Alaska Cession Treaty). Indeed, there are several tribal land claims currently pending in federal courts in the east, at least one of which encompasses the islands and navigable waters of the St. Lawrence River immediately adjacent to the Canadian border. *See St. Regis Mohawk Tribe, et al., v. New York*, C.A. No. 89-CV-829 (N.D. N.Y). If tribal claims do, indeed, conflict with federal paramount interests, then the government's powers over foreign affairs, foreign commerce, and national defense are equally at risk in the *St. Regis* case. But, obviously they are not, since the United States Government has intervened on behalf of the St. Regis Mohawk Tribe. *See* App. 70. *See also United States v. Turtle Mountain Band of Chippewa*, 612 F.2d 517, 519 (Ct. Cl. 1979) (upholding aboriginal title to 8 million acres on the Canadian border).

This Court has also expressly recognized that aboriginal title may include navigable waters. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall described Article V of the Treaty of Holston in these terms:

> [T]he Cherokees allow the United States a road through their country, and the *navigation of the Tennessee River.* The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them.

Id. at 556 (emphasis added). The Treaty of Holston was no anomaly. Similar provisions are found throughout the treaty-making era.[12]

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[12] *See, e.g.*, Treaty with the Six Nations, 1794, Article V, 7 Stat. 44 ("the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbours and rivers adjoining and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety"); Treaty with the Chickasaw, 1801, Article I, 7 Stat. 65 ("Provided always, that the necessary ferries over the water courses crossed by the said road shall be held and deemed to be the property of the Chickasaw Nation."); Treaty with the Creeks, 1814, Article 4th, 7 Stat. 120 ("The United States demand . . . *a right to the free navigation* of all [the Creeks'] waters") (emphasis added); Treaty with the Cherokee, 1817, Article 9, 7 Stat. 156 ("It is also provided by the contracting parties, that nothing in the foregoing articles shall be construed also as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein"); Treaty with the Osage, 1825, Article 2, 7 Stat. 240 ("And the United States do, hereby, reserve to themselves, forever, the right of navigating, freely, all water courses and navigable streams, within or running through, the tract of country above reserved to said Tribes or Nations"); Treaty with the Kansas, 1825, Article 11, 7

Since *Worcester*, this Court has continued to recognize that Indian Tribes hold aboriginal rights to fisheries in navigable waters, including ocean waters. *See, e.g., United States v. Winans*, 198 U.S. 371, 381 (1905) (river waters); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 678-81, 688 (1979) (ocean waters off the Pacific Northwest coast); *Damon v. Hawaii*, 194 U.S. 154, 157-58 (1904) (ocean waters off Hawaii); and *Carter v. Territory of Hawaii*, 200 U.S. 255, 256-57 (1906) (ocean waters off Hawaii).[13]

Stat. 244 ("It is further agreed on, by and between the parties to these present, that *the United States shall forever enjoy the right to navigate freely all water courses or navigable streams within the limits of the tract of country herein the Kansas Nation . . . ")* (emphasis added); Treaty with the Winnebago, et al., 1828, Article 1, 7 Stat. 315 ("It is also agreed by the Indians that a ferry may be established over the Rock River, where the Fort Clark road crosses the same; and, also, a ferry over the same river at the crossing of the Lewiston road"); Treaty with the Nez Perce, 1855, Article III, 12 Stat. 957 ("The use of the Clear Water and other streams flowing through the reservation is also secured to citizens of the United States for rafting purposes, and as public highways"); Treaty with the Blackfeet, 1855, Article 8, 11 Stat. 657 ("the navigation of all lakes and streams shall be forever free to citizens of the United States").

[13] *See also United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *remanded on other grounds*, 623 F.2d 448 (6th Cir. 1980), *decree mod.*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981), holding that Michigan tribes possess aboriginal title, including aboriginal fishing rights to huge portions of the Great Lakes.

> The right to fish is one of the aboriginal usufructuary rights included within the totality of use and occupancy rights which Indian tribes might possess. . . . The factual predicate giving rise to the reservation or retention of the right to fish in the

More recently, in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), a case that also involved aboriginal rights in the Alaska OCS, this Court reaffirmed that aboriginal title can cover water as well as land:

> aboriginal title or right is a right of exclusive use and occupancy held by Natives in lands *and waters* used by them and their ancestors prior to the assertion of sovereignty . . . by the United States.

Id. at 536 n.4 (emphasis added; citations omitted).

In short, the Ninth Circuit's decision conflicts in principle with numerous opinions of this Court recognizing aboriginal title to both lands and waters in every territory over which the United States has extended its jurisdiction. If there is to be such a decisive break from these ancient and honorable rulings, it should come from this Court, not the Ninth Circuit.

> Great Lakes is a showing of the Indians' dependence upon that resource.

471 F. Supp. at 256. The court concluded that these rights were protected by the Treaty of Ghent between the United States and Great Britain, in which both nations "acknowledged . . . aboriginal Indian rights to use land, sea, and air." *Id.* at 206. Although by treaty in 1836 "the Indians granted to the United States their ownership in the land and waters of the Great Lakes . . . they retained all those rights not specifically conveyed. Among the retained rights was the aboriginal right to continue to fish in the ceded waters of the Great Lakes." *Id.* at 213.

IV. THE NINTH CIRCUIT'S DECISION ERRONEOUSLY DECIDES AN IMPORTANT QUESTION OF FIRST IMPRESSION THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The specific question as to whether federal paramountcy precludes aboriginal rights in the OCS is, as the Ninth Circuit acknowledged, a question of first impression. *See* App. 1 at 2. However, the general question whether Alaska Tribes may hold aboriginal title to the OCS has been in litigation for over seventeen years.[14] Various aspects of this issue have reached this Court twice[15] and the Ninth Circuit on six separate occasions, including the instant case.[16] There is every reason to believe such litigation will continue, until the issue is finally resolved by this Court. Moreover, given the opinion below, it appears inevitable that such litigation will likewise be subjected to the Ninth Circuit's erroneous application of the paramountcy doctrine, unless this Court directs otherwise.

In reaching its conclusion that Federal Paramountcy precludes aboriginal rights in the OCS the Ninth Circuit

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[14] *See Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (9th Cir.), *cert. denied*, 474 U.S. 820 (1985).

[15] *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), and *Inupiat Community of the Arctic Slope v. United States*, 485 U.S. 972 (1988).

[16] *See Village of Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984); *Village of Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985); *Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989); *Village of Gambell v. Babbitt*, 999 F.2d 403 (9th Cir. 1993); *Nome Eskimo Community v. Babbitt*, 67 F.3d 813 (9th Cir. 1995).

not only overlooked the fact that the Tribes' rights have been protected by Congress, it ignored two other critical distinctions between the Tribes' claims here and the States' claims in the paramountcy cases. First, Congress holds plenary power over Indian affairs and can modify or extinguish a tribe's aboriginal title, including its hunting and fishing rights, at will and without compensation, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 280-285 (1955); and tribes can neither sell nor otherwise dispose of their aboriginal rights without the consent of the United States. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). Congress has no power to extinguish or confiscate state property except in the exercise of its power of eminent domain, which must be authorized by Congress and for which compensation must be paid. *United States v. Carmack*, 329 U.S. 230, 241-43 (1946); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941). States, on the other hand, may sell or otherwise dispose of their property *without* the consent of the United States.

Second, the constitution limits the federal government's power to restrict or interfere with the States' governing authority, whereas there are no such limits on Congress' power over tribal governing authority. The federal government's authority over the states is expressly limited by the Tenth Amendment, and by our constitutional system of "dual sovereignty." *Printz v. United States*, 117 S.Ct. 2365, 2376 (1997); *New York v. United States*, 505 U.S. 144, 155 (1992). There is no such limitation on Congress' power over Tribes. In *New York*, this Court struck down a federal law that "commandeer[ed] the legislative processes of the States by directly

compelling them to enact and enforce a federal regulatory program." 505 U.S. 161. According to the Court, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*, 505 U.S. at 162 (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)). The Court went on to hold that:

> The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government.

Id. at 162. In contrast, there are no constitutional protections for tribal sovereignty.[17] Congress has the power to terminate its recognition of tribal status and extinguish Indian Country status, thereby limiting or divesting a tribe's governing powers altogether, including its power to regulate the exploitation of its hunting and fishing resources within its aboriginal territory. *Alaska v. Native Village of Venetie*, 118 S.Ct. 948, 955-56 (1998); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 594 (1977); *Menominee Tribe v. United States*, 391 U.S. 404, 412-413 (1968); F. Cohen, Handbook on Federal Indian Law at 43, 467 (1982 ed.).

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[17] Tribes are only mentioned once in the Constitution, in art. I, § 8, cl. 3, which gives Congress power "to regulate Commerce. . . . with the Indian Tribes." "Indians" are mentioned in art. I, § 3 and the Fourteenth Amendment, § 2, both of which exclude "Indians not taxed" from being counted for purposes of apportioning the House of Representatives. None of these provisions limit the federal government's powers over Tribes.

These undeniable distinctions between Congress' power over the states and over the tribes are directly relevant here. Because Congress' power to confiscate state property or encroach on state governing authority is strictly limited by the Constitution, the States' claims of ownership and sovereignty over the adjacent sea in the paramountcy cases posed a genuine threat to the federal government's external powers over foreign relations, commerce, war and peace. Had the states prevailed, they, rather than Congress, would have held "the paramount right and power to determine in the first instance when, how, and by what agencies . . . the oil and other resources of . . . the marginal sea . . . [might] be exploited." *California*, 332 U.S. at 29. Thus, the States' claims created a dilemma which Congress may have lacked the constitutional power to resolve.

The Tribes' aboriginal claims pose no similar threat to the exercise of federal powers. The Tribes' aboriginal property rights, as well as their governing powers, remain totally and completely within the discretion of Congress. Whether these rights and powers will continue, be modified, rendered nonexclusive, or extinguished outright, lies within the unfettered discretion of Congress.

The court below, however, surprisingly claims that the Supremacy Clause of the Constitution places the States in the same position as the Tribes. App. 1 at 15. The court cites no authority for this conclusion, and there is none. Although the Supremacy Clause makes federal law the supreme law of the land which overrides conflicting state laws, it does not authorize Congress to violate the constitutionally protected sovereignty of the states. There are limits beyond which the federal government cannot

go. Indeed, less than two years ago, this Court flatly rejected a similar supremacy argument, holding that neither the Necessary and Proper clause, the Commerce Clause, *nor the Supremacy Clause* authorize Congress to violate state sovereignty. *Printz v. United States*, 117 S.Ct. 2365, 2379 (1997). For the same reason, had the States prevailed in the paramountcy cases, Congress would have lacked the power to dictate how they should exercise their governing powers over the exploitation and management of the mineral resources of the adjacent sea.

The fallacy in the lower court's argument that "exclusive" fishing rights violate federal paramountcy is illuminated by the Marine Mammal Protection Act of 1972,[18] the Endangered Species Act of 1973,[19] and the International Whaling Convention of 1946,[20] all of which recognize and protect *exclusive* Native hunting rights in the OCS. If, as the Ninth Circuit maintains, exclusivity violates federal paramountcy, then these Acts are also in violation.[21] Obviously, they are not. The lower court

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[18] 16 U.S.C. 1361-1421h (prohibiting the hunting of marine mammals with an exclusive exemption for Natives).

[19] 16 U.S.C. 1531-1544 (prohibiting the hunting of endangered species with an exclusive exemption for Natives).

[20] International Whaling Convention, *done* Dec. 2, 1946, 62 Stat. 1716, 1723 (1946) (protecting whales with an exclusive exemption for Native aboriginal whaling rights).

[21] Moreover, if, as the lower court maintains, all rights in the adjacent sea, other than those of the United States, are automatically precluded for violation of federal supremacy, then the Secretary's IFQ regulations, themselves, which grant *exclusive* fishing rights for halibut and sablefish, would also violate federal paramountcy.

confuses the Secretary's authority with that of Congress. It is the Congress, not the Secretary, that must determine whether exclusive aboriginal fishing rights violate federal paramountcy and should be extinguished. Only Congress can effectuate an extinguishment of aboriginal rights – not the Secretary or the courts. Congress has chosen to protect aboriginal rights in the OCS. Thus, rather than conflicting with the authority of the United States, they are *authorized* by the United States.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: March 8, 1999

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NATIVE VILLAGE OF EYAK; Native Village of Tatitlek; Native Village of Chanega (Aka Chenega); Native Village of Nanwalek; Native Village of Port Graham, Plaintiffs-Appellants,

v.

TRAWLER DIANE MARIE, INC.; William Daley, Secretary of Commerce, Defendants-Appellees.

No. 97-35944.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 14, 1998.

Decided Sept. 9, 1998.

Laurence A. Aschenbrenner (argued), Heather R. Kendall-Miller, Martha L. King, Native American Rights Fund, Anchorage, Alaska, Carol E. Daniel, Anchorage, Alaska, William Caldwell, Alaska Legal Services Corporation, Fairbanks, Alaska, for appellants Native Villages of Eyak, Tatitlek, Chanega, Nanwalek, Port Graham.

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Appeal from the United States District Court for the District of Alaska; H. Russel Holland, District Judge, Presiding. D.C. No. CV-95-0063-HRH.

Before: FARRIS, O'SCANNLAIN, and HAWKINS, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

In this case of first impression, we must consider Alaskan Native Village claims of aboriginal title, including exclusive hunting and fishing rights, to the outer continental shelf of the United States.

I

The Alaskan Native Villages of Eyak, Tatitlek, Chanega, Port Graham, and Nanwalek (collectively, the "Native Villages") appeal the district court's summary judgment in favor of the Secretary of the United States Department of Commerce ("Secretary") in their action asserting unextinguished aboriginal title to a portion of the outer continental shelf ("OCS")[1] of the United States. According to the Native Villages, regulations promulgated by the Department of Commerce for the management of halibut and sablefish fisheries violate their rights to the exclusive use and occupancy of the OCS. The Native Villages are located in the Prince William Sound, the Gulf of Alaska, and the lower Cook Inlet regions of Alaska. They claim that, for more than 7,000 years, their members have hunted sea mammals and harvested the

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[1] "[The OCS includes] all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of [the Submerged Lands Act], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a). The OCS includes those submerged lands outside state territorial boundaries (which in Alaska's case means beyond three miles) extending to the outer geologic edge of the continental shelf and within United States jurisdiction and control.

fishery resources of the OCS. The Native Villages maintain that a majority of their members still maintain a subsistence lifestyle heavily reliant on the fish and wildlife of the OCS, and that their continued social, cultural, and economic well-being depends on their continued ability to hunt and to fish in their traditional territories on the OCS. The Native Villages argue that they are entitled to exclusive use and occupancy of their respective areas of the OCS, including exclusive hunting and fishing rights, based upon unextinguished aboriginal title.

The Secretary of Commerce[2] manages fisheries pursuant to the Magnuson Fishery Conservation Management Act ("Magnuson Act"), 16 U.S.C. §§ 1801-1882. The Magnuson Act extended the sovereign control and jurisdiction of the United States to waters lying between 3 and 200 miles off the coast of the United States by establishing an exclusive fishery conservation zone and asserting "sovereign rights and exclusive fishery management authority over all fish and all Continental Shelf fishery resources, within the exclusive economic zone." 16 U.S.C. § 1811. Pursuant to the Magnuson Act and the Northern Pacific Halibut Act of 1982 ("Halibut Act"), 16 U.S.C. §§ 773-773k, the Secretary promulgated regulations in 1993 limiting access to the sablefish and halibut fisheries in the Gulf of Alaska and the lower Cook Inlet. See 50

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[2] The only defendant remaining in this action is the Secretary of Commerce. The Native Villages' action against the Secretary of the Interior was dismissed for lack of ripeness and not appealed. The Native Villages' action against the Trawler Diane Marie, Inc., was dismissed pursuant to a stipulation of the parties.

C.F.R. § 676. The Native Villages challenge the Secretary's fishing regulations on the ground that they improperly authorize non-tribal members to fish within the Native Villages' exclusive aboriginal territories while prohibiting Native Village members without Individual Fishing Quotas ("IFQ")[3] from doing the same. The Native Villages have requested an injunction against the Secretary's fishing regulations and a declaration that they hold aboriginal title and exclusive aboriginal rights to use, occupy, possess, hunt, fish, and exploit the waters, and to the mineral resources within their traditional use areas of the OCS.

Both the Native Villages and the Secretary moved for summary judgment before the district court. Granting the Secretary's motion and denying the Native Villages' motion, the district court held: (1) that federal paramountcy precludes aboriginal title in the OCS and (2) that there is no exclusive aboriginal right to fish in navigable waters based on aboriginal title outside of a treaty or federal statute.[4] The Native Villages appeal.

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[3] Any boat that fishes commercially for sablefish or halibut in the regulated area must have an IFQ share permit issued by the Secretary specifying the individual fishing quota allowed for the vessel. See 50 C.F.R. § 676.13(a). The regulated area consists of portions of the Gulf of Alaska, see 50 C.F.R. § 676.10(b), encompassing the Native Villages' aboriginal hunting and fishing grounds. The Native Villages maintain that, although a few of their members possess IFQ permits, the vast majority do not.

[4] The district court decided "only the aboriginal title issues, . . . [and left] for another day the question of what nonexclusive fisheries rights, if any, plaintiffs might have in the OCS which are not dependent upon aboriginal title." We therefore express no opinion on this issue.

II

We first consider whether the district court erred in concluding that the federal paramountcy doctrine bars the Native Villages' aboriginal title claims to the OCS, including exclusive hunting and fishing rights.

A

The "federal paramountcy doctrine" is derived, in essence, from four Supreme Court cases in which the federal government and various coastal states disputed ownership and control of the territorial sea and the adjacent portions of the OCS.

The first of these cases was *United States v. California*, 332 U.S. 19, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947), in which the United States sued to enjoin the State of California from executing leases authorizing the taking of petroleum, gas, and other mineral deposits from the Pacific Ocean. The United States argued that it owned in fee simple, or possessed "paramount rights" in, the lands, minerals, and "other things of value" underlying the ocean and sought a decree so declaring. *Id.* at 22. In response, California contended that the area in question, which extended just three miles into the ocean from the low-water mark off its coast, was within its boundaries. *See id.* California reasoned that, because the original thirteen states had acquired from the Crown of England title to all lands within their boundaries under navigable waters (including a three-mile belt in adjacent seas), and because California was admitted on an "equal footing" with the original states, it also became vested with title to

these submerged lands upon entry into the Union. *See id.* at 23.

The issue before the Supreme Court, then, was "whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered may be exploited." *Id.* at 29. Rejecting California's argument, the Court concluded that the acquisition of the three-mile belt, as well as its protection and control, has been and is a function of "national external sovereignty." *Id.* at 34. The Court dismissed the idea that the "local interests" which support a state's dominion over its land-locked navigable waters in any way favor state control over any part of the ocean. *See id.* Instead, the Court decided, it is the federal government which "must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts." *Id.* at 35. Matters which occur in the open sea are questions for consideration among nations, not among their separate governmental units, which, under our constitutional system, are "not equipped . . . with the powers or the facilities for exercising the responsibilities" accompanying dominion over the ocean. *Id.* Thus, the Court declared, "California is not the owner of the three-mile marginal belt along its coast." *Id.* at 38. Instead, "the Federal Government rather than the state has paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil." *Id.* at 38-39.

Bolstered by the favorable outcome in California, the United States brought similar actions to confirm its title to the seabed adjacent to other coastal states. In *United States v. Louisiana*, 339 U.S. 699, 70 S.Ct. 914, 94 L.Ed. 1216 (1950), the United States brought suit against the State of Louisiana, which argued that it held title to the seabed under the waters extending twenty-seven miles into the Gulf of Mexico. According to Louisiana, before and since the time of its admission to the Union, it had exercised dominion over the area in question and by state statute had even formally included the twenty-seven-mile belt within its boundaries. *See id.* at 701. The Supreme Court disagreed. Finding California controlling, the Court held:

> Protection and control of the area are indeed functions of national external sovereignty. The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.
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> *Id.* at 704 (citations omitted) (emphasis added).

The Court found that the only difference between the argument raised by Louisiana and the one raised by California was that Louisiana's claimed boundary extended twenty-four miles beyond California's three-mile claim. *See id.* at 705. This difference did not weigh in Louisiana's favor, however:

> If . . . the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows a fortiori that the ocean beyond that limit also is. The ocean seaward of the marginal

> belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so. So far as the issues presented here are concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the ocean and the resources of the soil under that area, including oil.

Id. at 705-06 (emphasis added).

In the companion case to Louisiana, *United States v. Texas*, 339 U.S. 707, 70 S.Ct. 918, 94 L.Ed. 1221 (1950), the Supreme Court again reaffirmed its holding in California. The State of Texas had, by statute, extended its boundary first to a line twenty-four miles beyond the three-mile limit, and thereafter to the outer edge of the continental shelf. *See Texas*, 339 U.S. at 720. Texas raised a somewhat different argument than had either California or Louisiana, one more analogous to that asserted by the Villages here. Texas argued that, because it was a separate republic prior to its entry into the United States, it had both dominium (ownership or proprietary rights) and imperium (governmental powers of regulation and control) with respect to the lands, minerals, and other products underlying the marginal sea. *See id.* at 712. Upon entering the Union, Texas transferred to the federal government its powers of sovereignty – its imperium – over the marginal sea, but retained its dominium. *See id.* at 713.

The Supreme Court was not persuaded. While the Republic of Texas may have had complete sovereignty and ownership over the marginal sea and all things of value derived therefrom, the State of Texas did not. *See*

Texas, 339 U.S. at 717. "When Texas came into the Union, she ceased to be an independent nation. . . . The United States then took her place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like." *Id.* at 717-718. As an incident to the transfer of that sovereignty, any "claim that Texas may have had to the marginal sea was relinquished to the United States." *Id.* at 718. The Court recognized that "dominion and imperium are normally separable and separate"; however, in this instance, "property interests are so subordinated to the rights of sovereignty as to follow sovereignty." *Id.* at 719. The Court rejected the argument that "the sovereignty of the sea can be complete and unimpaired no matter if Texas owns the oil underlying it," concluding that "once low-water mark is passed the international domain is reached." *Id.* At that point, "[p]roperty rights must . . . be so subordinated to political rights as in substance to coalesce and unite in the national sovereign." *Id.* The Court reasoned: "Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself. If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities." *Id.* (emphasis added).

In the last of the paramountcy cases, *United States v. Maine*, 420 U.S. 515, 95 S.Ct. 1155, 43 L.Ed.2d 363 (1975), the United States brought an action against the thirteen Atlantic Coastal States asserting that the federal government was entitled to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean to the

exclusion of the coastal states for the purpose of exploring the area and exploiting its natural resources. *See id.* at 516-517. The area in dispute included the ocean lying more than three miles seaward from the ordinary low-water mark and from the outer limit of inland waters on the coast extending seaward to the outer edge of the continental shelf. The coastal states, with the exception of Florida, claimed that, as successors in title to certain grantees of the Crown of England (or the Crown of Holland, in New York's case), they were entitled to the exclusive right of dominion and control over the seabed underlying the Atlantic Ocean seaward from its coastline to the limits of the jurisdiction of the United States. *See id.* at 517-518. The coastal states maintained that "they acquired dominion over the offshore seabed prior to the adoption of the Constitution and at no time relinquished it to the United States." *Id.* at 519.

At the urging of the coastal states, the Supreme Court reexamined the decisions in California, Louisiana, and Texas. To the states' dismay, the Court concluded that these cases remained grounded on sound constitutional principles. *See id.* at 524. Whatever interest the states may have held in the sea prior to statehood, the Court held, as a matter of "purely legal principle . . . the Constitution . . . allotted to the federal government jurisdiction over foreign commerce, foreign affairs, and national defense and . . . it necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers the federal government has paramount rights in the marginal sea." *Id.* at 522-523 (citation and internal quotation marks omitted). The fact that the original thirteen states existed prior to the formulation of the

Union again proved to be of no constitutional importance. *See id.* at 523 (citing *Texas*, 339 U.S. at 717). Accordingly, judgment was entered in favor of the United States. *See id.* at 528.[5]

B

We turn now to the specific issue presented here: whether the federal paramountcy doctrine serves to bar not only state claims to the OCS, but also claims made by persons and entities indigenous to these lands, in this case, the Native Villages.

1

The district court reasoned that, if the states have no property rights in the OCS via the paramountcy doctrine, a fortiori, it cannot be otherwise for a tribal entity which, even if possessed of sovereign rights, is dependent upon the United States in the same manner as a state with regard to, inter alia, national defense, foreign affairs, and world commerce. Even though Indian tribes existed and governed North America before the United States came

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[5] In addition, the Supreme Court held that the rule that paramount rights to the offshore seabed inhere in the federal government as an incident of national sovereignty was confirmed by Congress in both the Submerged Lands Act of 1953 ("SLA"), which granted the individual states title to submerged lands lying three miles off their coasts, and the Outer Continental Shelf Lands Act of 1953, which the Court noted was a congressional reaffirmation of federal control over the OCS extending seaward of the three-mile limit. *See id.* at 524-528.

into existence, the same is true of the original states. Nevertheless, this did not prevent the Supreme Court from deciding that the states had no property or sovereign claims to the OCS. The district court thus found the claims of the Native Villages to be inconsistent with the sovereignty of the federal government in the OCS as expressed in the paramountcy cases.

The Native Villages argue that the district court erred in so concluding. They contend that the district court based its decision on an erroneous legal premise, namely, that their claims of aboriginal title are the legal equivalent of the states' claims of fee title and sovereignty. In fact, the Native Villages contend, the "legal, fee, or sovereign title" claimed by the states and aboriginal title are two very different property claims. According to the Native Villages, aboriginal title is not legal title or even a property right at all. Aboriginal title, according to the Native Villages, "presumes federal paramountcy" and bestows only the exclusive right to use and to occupy territory to which the federal government admittedly holds sovereign title, until Congress provides otherwise. Consequently, the Native Villages contend, their claim does not conflict with the federal government's paramount interests in the OCS.

In support of their argument, the Villages point to *Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir.1989), in which we noted that "aboriginal rights may exist concurrently with a paramount federal interest, without undermining that interest." *Id.* at 1277. The Villages assert that *Gambell* and the cases cited therein, including *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-36, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985), *Cramer v. United States*,

261 U.S. 219, 227, 43 S.Ct. 342, 67 L.Ed. 622 (1923), and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543, 5 L.Ed. 681 (1823), stand for the proposition that native tribes have an "unquestioned right . . . to the exclusive possession of their lands." They claim that to accept the district court's conclusion that aboriginal title in the OCS is precluded based on "nothing more than its potential effect on the government's power over national defense and international commerce," would violate the fundamental principle of federal Indian law, i.e., "that federal sovereignty is subject to the Indians' right of occupancy," unless and until extinguished by Congress.

2

As an initial matter, we caution the Native Villages not to read too much into our statement in *Gambell* that aboriginal rights may coexist with the federal government's paramount interests in the OCS. *See Gambell*, 869 F.2d at 1277. As we made clear in that case, only limited assertions of aboriginal subsistence rights were contemplated; exclusive rights to use or occupy areas of the ocean were never considered. Specifically, in our remand order, we directed the district court to determine, inter alia, "(1) whether the Villages in fact possess aboriginal subsistence rights in the OCS [and] (2) if the Villages do possess such rights, whether the drilling and other activities by the oil companies will interfere significantly with the Villages' exercise of those rights." *Id.* at 1280 (emphasis added). Plainly, if we had considered that the Villages could hold exclusive rights to the OCS, we would not have remanded for a determination of whether

the activities of third parties would "interfere significantly" with those rights. Any interference would have been enough to violate the Native Villages' exclusive rights. Therefore, *Gambell* at most provides some guidance here; it is not controlling on this issue of first impression.

Having said that, we note the statement in *Gambell* that the paramountcy doctrine is not limited merely to disputes between the national and state governments. *See Gambell*, 869 F.3d at 1276; *see also Inupiat Community of the Arctic Slope v. United States*, 548 F.Supp. 182 (D.Alaska 1982), *aff'd*, 746 F.2d 570 (9th Cir.1984). Any claim of sovereign right or title over the ocean by any party other than the United States, including Indian tribes, is equally repugnant to the principles established in the paramountcy cases. *See id.*

This case presents a markedly different situation from the one we considered in *Gambell*. The Native Villages here assert exclusive rights of use and occupancy, not limited rights. Although they assure us that their claims to the OCS are "subordinate" to federal sovereignty, in that aboriginal title "presumes" federal paramountcy in the OCS, we are hard pressed to see a practical difference between the relief sought by the Native Villages and that sought by the states in the paramountcy cases. The Native Villages pray for a declaration that they "hold aboriginal title and exclusive aboriginal rights to use, occupy, possess, hunt, fish, and exploit the waters, and mineral resources within their traditional use areas of the OCS in Prince William Sound, the Gulf of Alaska, and Cook Inlet." They seek exclusive use of the ocean resources and regulatory power over third parties,

including officials of our executive branch of government, subject only to the laws of Congress. We fail to see how this differs from the claims asserted by the states. Simply saying that a claim of aboriginal title is less intrusive than a claim of fee title does not make it so.

Further, the Native Villages' purported concession that they "do not dispute Congress's ultimate power to enact laws authorizing non-tribal members to fish within their aboriginal fishing grounds" is really no concession at all. The Supremacy Clause of the Constitution inherently requires the same of states; yet this truism did not save the states' claims to the OCS. And it does not save the Native Villages' claims here. Before the Supreme Court, the State of Texas raised a similar argument, contending that there could be "joint" ownership or control over the OCS. According to Texas, the federal government could hold complete and unimpaired sovereignty over the sea while Texas owned the resources lying beneath it. *See Texas*, 339 U.S. at 719. The Court was not persuaded. It held that – whereas ownership or proprietary rights in property can be, and usually are, separated from the governmental powers of regulation and control – when dealing with the ocean, "[p]roperty rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereign." *Id.* As the Court noted prophetically, "[t]oday the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself." *Id.* Or, as we see here, it may be over fishing and hunting rights. This is why the Supreme Court held, "[i]f the property, whatever it may be, lies seaward of the low-water mark, its use, disposition, management, and control involve

national interests and national responsibilities." *Id.* (emphasis added). No exception was made for Indian tribes, which, like states, are subordinate to the federal government, and hence, cannot "claim rights which are . . . entrusted to the one external sovereign recognized by the Constitution." *Inupiat*, 548 F.Supp. at 187. We agree that, "[i]f, as a matter of constitutional law, the federal government must be possessed of paramount rights in offshore waters, it makes no difference whether the competing domestic claimant is a state or tribe of American natives." *Id.* We simply have no power to split the rights in the OCS as the Native Villages would like.

Finally, we reject the argument that the Native Villages are entitled to exclusive use of the OCS because they have hunted and fished in the sea for thousands of years prior to the founding of the United States. While we respect the history of the Native Villages and appreciate the importance of the OCS to them, the Supreme Court was likewise cognizant of the history of the coastal states in California, Louisiana, Texas and Maine. This did not, however, convince the Court to put the ocean and its resources at the disposal of the states. Whatever interests the states might have had in the OCS and marginal sea prior to statehood were lost upon ascension to the Union. *See Maine*, 420 U.S. at 522; *Louisiana*, 339 U.S. at 704; *Texas*, 339 U.S. at 717; *California*, 332 U.S. at 34-35. The Constitution allotted to the federal government jurisdiction over foreign commerce, foreign affairs, and national defense so that as attributes of these external sovereign powers, it has paramount rights in the contested areas of the sea. *See Maine*, 420 U.S. at 522; *Louisiana*, 339 U.S. at 704; *Texas*, 339 U.S. at 717; *California*, 332 U.S. at 38. This principle

applies with equal force to all entities claiming rights to the ocean: whether they be the Native Villages, the State of Oregon, or the Township of Parsippany. "National interests, national responsibilities, national concerns are involved" in all these cases. *Louisiana*, 339 U.S. at 704. The Native Villages' claim to complete control over the OCS is contrary to these national interests and inconsistent with their position as a subordinate entity within our constitutional scheme. *See Inupiat*, 548 F.Supp. at 187 (citing *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), for the proposition that Indian tribes are "dependent . . . within our territorial jurisdiction" and have no "freedom to determine external relations."). We therefore hold that the Native Villages are barred from asserting exclusive rights to the use and occupancy of the OCS based on unextinguished aboriginal title.

III

For the foregoing reasons, we conclude that the district court did not err in holding that the Native Villages' claims to the OCS are barred by the federal paramountcy doctrine.[6]

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[6] Because we so hold, we need not reach the district court's alternative holding that common law property precepts preclude tribes from possessing exclusive hunting or fishing rights in navigable waters absent a treaty or statute. We have ruled on this issue previously in *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir.1981), however, in which we held that the Chinook Indians had no aboriginal fishing rights to the Columbia River. In *Wahkiakum*, we noted that "[a]n aboriginal right to fish has been recognized only in the context of interpretation of a ratified treaty or federal statute, where

AFFIRMED.

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courts have held that aboriginal fishing rights were impliedly reserved to the Indians." *Id.* at 180 n. 12; *see also Confed. Tribes of Chehalis v. Washington*, 96 F.3d 334, 341 (9th Cir.1996) (citing *Wahkiakum* for the same). We are aware of no cases holding to the contrary.

Similarly, we need not reach the issue of whether the Villages' challenges to the sablefish regulations promulgated under the Magnuson Fishery Conservation Management Act are barred by the statute of limitations.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF EYAK, et al.,

Plaintiffs,

vs.

TRAWLER DIANE MARIE, INC., et al.,

Defendants.

No. A95-0063-CV (HRH)

ORDER

(Filed Jun. 17, 1997)

Federal Defendant's
Motion for Summary Judgment;
Plaintiffs' Motion
for Partial Summary Judgment

Plaintiffs move for partial summary judgment.[1] The Secretary of the United States Department of Commerce cross-moves for summary judgment.[2] Both motions are opposed. Oral argument has been heard.

FACTS

Plaintiffs are the Alaska Native villages of Eyak, Tatitlek, Chanega, Port Graham, and Nanwalek. These villages are located in the Prince William Sound and lower Cook Inlet regions of Alaska. They assert unextinguished

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[1] Clerk's Docket No. 35.

[2] Clerk's Docket No. 41. Pursuant to this court's order, at Clerk's Docket No. 49, all claims against the Secretary of the Interior were dismissed.

aboriginal title to portions of the Outer Continental Shelf (OCS).

> [The OCS is] all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of [the Submerged Lands Act], and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

43 U.S.C. § 1331(a) (1994). The OCS, therefore, includes those submerged lands outside state territorial boundaries, but within United States' jurisdiction and control.

Defendants are the Secretary of the Department of Commerce (DOC) and the Trawler Diane Marie, Inc.[3] Pursuant to the Fishery Conservation and Management Act (FCMA),[4] DOC manages fisheries in a two-hundred-mile belt of ocean waters known as the Exclusive Economic Zone (EEZ). The United States claims sovereign rights and *exclusive* fishery management authority over all fish and all continental shelf fishery resources within the EEZ. 16 U.S.C.A. § 1811(a).

The plaintiff villages assert that unextinguished aboriginal title to the OCS confers upon them the exclusive aboriginal rights to use, occupy, possess, hunt, fish, and exploit the waters and mineral resources within their traditional use areas of the OCS in Cook Inlet and the

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[3] Pursuant to court order, the proceedings between plaintiffs and the private defendant are stayed pending resolution of these preliminary motions between the plaintiffs and the federal defendant. Clerk's Docket No. 36.

[4] 16 U.S.C. § 1801-1882 (1994 and Supp. 1995); 16 U.S.C.A. §§ 1801-1883 (Supp. 1997).

Gulf of Alaska. Plaintiffs assert that the federal defendant has trespassed upon their right to an exclusive fishery along the OCS.[5]

The present focal point for plaintiffs' claim is DOC's management of halibut and sablefish.[6] DOC manages commercial fishing for halibut pursuant to the FCMA and the Northern Pacific Halibut Act,[7] and commercial fishing for sablefish pursuant to the FCMA. Plaintiffs challenge the "individual fishing quota" (IFQ) regulations for the commercial take of halibut and sablefish off Alaska which the DOC promulgated in 1993. 50 C.F.R. part 679.40 (1996). The IFQ program is a complex fishery management scheme which restricts a person's access to these fisheries based upon prior participation in the commercial fishery between 1984 and 1989 or the ability to obtain a permit from an original participant in the fishery. *Id.* An Alaska Native's ability to participate in these commercial fisheries is dependent on initial participation in the fishery, which plaintiffs state is a rarity, or the ability to purchase an IFQ permit. Plaintiffs assert that the IFQ program licenses trespass of their aboriginal territory and offends their exclusive right to fish for these species.

Plaintiffs request this court to find that DOC's IFQ regulations violate plaintiffs' aboriginal title and, flowing

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[5] Plaintiffs' Second Amended Complaint at 9, Clerk's Docket No. 60.

[6] Plaintiffs also challenged the lack of federal management over the scallop fishery in the EEZ in 1995. This challenge against the federal defendant was dismissed on mootness grounds. Clerk's Docket No. 49.

[7] 16 U.S.C. § 773 (1994); 16 U.S.C.A. § 773 (Supp. 1997).

from that title, their exclusive fishing rights to the halibut and sablefish. Plaintiffs have moved for partial summary judgment, seeking a declaration that plaintiffs' aboriginal title claims in the OCS are not precluded by the federal government's paramount interests in the OCS or by Ninth Circuit precedent and that plaintiff villages' aboriginal rights in the OCS have not been extinguished by Congress. The DOC requests complete dismissal of plaintiffs' claims on summary judgment, and requests this court to find that: (1) aboriginal title is inconsistent with federal paramount interest in the OCS and with international law; (2) the Outer Continental Shelf Lands Acts ("OCSLA")[8] extinguished all aboriginal rights or title to the OCS which may have previously existed; or (3) the Russian government, prior to acquisition of Alaska by the United States, extinguished any aboriginal rights to engage in commercial fishing that may have previously existed. The DOC further requests a finding that, notwithstanding plaintiffs' claim of aboriginal title, Alaska Natives hold no exclusive right to a fishery absent recognition of that right by treaty or federal statute. The court addresses these contentions in the following discussion section.

At the time of filing of these motions, plaintiffs had also filed suit against the Secretary of the Department of the Interior (DOI). The plaintiffs' complaint alleged that an oil and gas lease sale which DOI proposed was also a violation of plaintiffs' aboriginal title to the OCS. This court dismissed the plaintiffs' claim against DOI for lack

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[8] 43 U.S.C. §§ 1331-1356 (1994).

of a final agency action subject to judicial review.[9] However, the original presence of DOI in the suit shaped most of the legal arguments made in memoranda opposing and in support of summary judgment. During oral argument on these motions, and after the DOI had been dismissed, the court inquired of plaintiffs whether their remaining claims were based exclusively on aboriginal title. Counsel was asked in this context if plaintiffs' position was an "all [that is, aboriginal title exists], or nothing [that is, plaintiffs have no other rights in the OCS']" proposition. Counsel responded affirmatively (that is, the plaintiffs sought solely a determination of whether aboriginal title exists), but subsequently thought better of that position. As a consequence, plaintiffs' second amended complaint was tendered and ordered filed.[10] In this order, the court decides only the aboriginal title issues. The court leaves for another day the question of what non-exclusive fisheries rights, if any, plaintiffs might have in the OCS which are not dependent upon aboriginal title. However, this order will address defendant's contention raised in its motion for partial summary judgment: that, notwithstanding plaintiffs' claim of aboriginal title, Alaska Natives hold no exclusive right to a fishery absent recognition of that right by treaty or federal statute.

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[9] Clerk's Docket No. 49.

[10] Order at Clerk's Docket No. 59; Second Amended Complaint at Clerk's Docket No. 60.

DISCUSSION

Nature of Aboriginal Title

Aboriginal title is a right of exclusive use and occupancy held by indigenous people in lands and waters used by them and their ancestors prior to the assertion of sovereignty over such areas by the United States. *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 536 n.4 (1987). Justice Marshall explained the origin of aboriginal title in *Johnson v. M'Intosh*:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. . . . As [all the European nations were] in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
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> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it.
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> . . . .
>
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They

> were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

21 U.S. (8 Wheat.) 543, 572-74 (1823).

The Supreme Court in both the *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941), and *Oneida Indian Nation of New York v. Oneida County New York*, 414 U.S. 661 (1974) (*Oneida I*) summarized case law that developed the doctrine of aboriginal title:

> "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only been interfered with or determined by the United States." *Cramer v. United States*, 261 U.S. 219, 227, This policy was first recognized in *Johnson v. M'Intosh*, 8 Wheat 543, and has been repeatedly reaffirmed. *Worcester v. Georgia*, 6 Pet. 515; *Mitchel v. United States*, 9 Pet. 711; *Choteau v. Molony*, 16 How. 203; *Holden v. Joy*, 17 Wall. 211; *Buttz v. Northern Pacific Railroad*[, 119 U.S. 55]; *United States v. Shoshone Tribe*, 304 U.S. 111. As stated in *Mitchel v. United States*, *supra*, p. 746, Indian "right of occupancy is considered as sacred as the fee simple of the whites."

United States v. Santa Fe Pacific R.R. Co., 314 U.S. at 345 (*quoted in Oneida I*, 414 U.S. at 668).

Aboriginal title exists independent of congressional recognition, which is why it sometimes referred to as "unrecognized title." It depends on facts demonstrating aboriginal possession. Proof of aboriginal title is a question of fact and is established by actual, continuous, and exclusive possession of a given territory. Determination of actual possession is drawn from the life ways of the indigenous communities:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way, and for their own purposes, were as much respected. . . .

Mitchel v. United States, 34 U.S. (9 Pet.) 711, 745 (1835).

As against any but the sovereign, aboriginal title is accorded the protection of complete ownership. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946). This complete ownership includes "a full beneficial interest [including] full use and enjoyment of the surface and mineral estate, and to the fruits of the land[.]" F. Cohen, *Handbook of Federal Indian Law*, 491 (1982). However, case law distinguishes between the right to a full beneficial interest in land and the right to a full beneficial interest in the wild fish that traverse navigable waters. There is no exclusive aboriginal right to fish in navigable waters based upon aboriginal title alone. *Tlingit & Haida Indians of Alaska v. United States*, 389 F.2d 778, 785 (Ct. Cl. 1968). The court of claims' seminal case on such aboriginal claims, which is cited above, declared:

> There is no aboriginal right based on occupancy and use [*i.e.*, aboriginal title] which gives plaintiffs title to the fish or an exclusive right to remove all fish. . . .
>
> . . . Nor is there a property right to a fishery location based on aboriginal occupancy and use.

Id. at 788, 787. This holding appears to create an dichotomy in light of the Supreme Court's declaration that aboriginal title is a right of exclusive use and occupancy held by indigenous people in lands and waters used by them and their ancestors. If use of the lands and waters is exclusive, is not use of the living resources also exclusive? The court in *Tlingit & Haida Indians* answers this question in the negative, because it is the nature of the resource (*Ferae naturae*) and the locality in which the resource resides (navigable waters) that require a distinction. The court stated:

> Since the primordial decision in *Geer v. Connecticut*, 161 U.S. 519 (1896), it has been uniformly held that there is no property right in any private citizen or group to wild game or to freely-swimming migratory fish in navigable waters. Fish are *Ferae naturae*, capable of ownership only by possession and control. No citizen has any right to fish nor to exclude any other citizen from an equal opportunity to exercise his right to possession. *Shively v. Bowlby*, 152 U.S. 1 [] (1894). This court has repeatedly adhered to that rule of law. *Aleut Community of St. Paul Island v. United States*, 117 F. Supp. 427, 127 Ct.Cl. 328, 334 (1954). *Cf. Bishop v. United States*, 126 F. Supp. 449, 130 Ct.Cl. 198 (1954, *cert. denied*, 349 U.S. 955 (1955); *Fleming v. United States*, 352 F.2d 533, 173 Ct.Cl. 426 (1965). There are no exclusive

rights to fish in Indians. *United States v. Winans*, 198 U.S. 371 (1905).

Tlingit & Haida Indians, 389 F.2d at 785 (parallel citations omitted). Thus, while it is feasible that Congress and Native Americans may reserve by treaty an exclusive right to a fishery, absent that recognition, aboriginal fishing rights in navigable waters are non-exclusive.[11]

Non-exclusive aboriginal fishing rights can exist irrespective of a tribe's ability to prove aboriginal title to lands, and it also exists independent of congressional recognition. Cohen, *Handbook of American Indian Law* at 442. The requirement of exclusive use, required for aboriginal title, is relaxed for a claim of aboriginal hunting or fishing rights and has been satisfied by "a showing that a single tribe was one of many tribes hunting over an area in common." *Id.* Hunting and fishing rights are also usufruct rights that will burden property one subject to aboriginal title that was ceded by treaty. *Lac Courte Oreilles Band v. Wisconsin*, 760 F.2d 177 (7th Cir. 1985); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *remanded on other grounds*, 623 F.2d 448 (6th Cir. 1980), *decree modified*, 653 F.2d 277, *cert. denied*, 454 U.S. 1124 (1981) (*citing Menominee Tribe v. United States*, 391 U.S. 404 (1968).

Aboriginal hunting and fishing rights remain with Native Americans and their descendants unless granted

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[11] *Tlingit & Haida Indians* states that the only time an Indian tribe might exclude non-Indians from fishing in navigable waters is if the tribe reserved title by treaty to the submerged lands beneath navigable waters and the treaty also reserved the right to fish in designated areas free from interference. *Id.* at 785.

to the United States by treaty, abandoned, or extinguished by Congress. Cohen, *Handbook of American Indian Law* at 442-43. So too does aboriginal title, which exists at the pleasure of the United States. *Confederated Tribes of Chehalis v. Washington*, 96 F.3d 334 (9th Cir. 1996), *cert. denied*, 65 U.S.L.W. 3689 (1997). Congress may extinguish such title "by treaty, by the sword, by purchase [or] by the exercise of complete dominion adverse to the right of occupancy." *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. at 347.

> Extinguishment terminates corresponding use and occupancy rights, including fishing rights, except where such rights are expressly or impliedly reserved in a treaty, statute, or executive order.

Confederated Tribes of Chehalis, 96 F.3d at 341. The United States does not have to compensate Native Americans for the extinguishment of aboriginal title and rights. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*, 700 F.2d 341, 351 (7th Cir. 1983). Although rights and title may be extinguished by implication, the intent to extinguish aboriginal title will not be lightly implied. *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. at 346. Absent express extinguishment, there must be evidence that demonstrates a "plain and unambiguous" intent to extinguish this title. *Oneida County New York v. Oneida Indian Nation of New York*, 470 U.S. 226, 248 (1985) (*Oneida II*). "Relying on the strong policy of the United States 'from the beginning to respect the Indian right of occupancy' . . . it '[c]ertainly' would require 'plain and unambiguous action to deprive the Indians of the benefits of that policy[.]" *Id.* (citations omitted).

Aboriginal Title in Alaska OCS

With this background as to the basis for and nature of aboriginal title, the court turns to question of whether aboriginal titles have been extinguished in the Alaska OCS.

Section four of the Alaska Native claims Settlement Act[12] (ANCSA) extinguished aboriginal title in Alaska:

> (b). . . .
>
> All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c). . . .
>
> All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

43 U.S.C. § 1603(b)-(c).

The House report accompanying the bill that became law stated:

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[12] 43 U.S.C. §§ 1601-1629a (1994); 43 U.S.C.A. §§ 1606-29f (Supp. 1997).

> (1) The section extinguishing aboriginal titles and claims based on aboriginal title is intended to be applied broadly, and to bar any further litigation based on such claims of title. The land and money grants contained in the bill are intended to be the total compensation for such extinguishment.

H.R. Rep. No. 92-523, at 6, 9 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2198. The conference committee report further stated:

> It is the clear and direct intent of the conference committee to extinguish *all* aboriginal claims and *all* aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska.

H.R. Conf. Rep. No. 92-746, at 34, 40 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2253 (emphasis in original).

Congress seemed to have said what it meant and meant what it said about barring all aboriginal titles and claims to such by Native peoples of Alaska. Inclusion of references to fishing rights and to offshore waters would seem to dispose of plaintiffs' claims. Even the attorney for the Alaska Federation of Natives before the congressional committee stated, "[t]he position that the Natives have taken is that they are prepared for an extinguishment of anything that is based upon aboriginal title." *Alaska Native Land Claims: Hearings on S. 1830 Before the Senate Comm. On Interior and Insular Affairs*, 91st Cong. 1st. Sess. 301 (1969).

If the foregoing statutory language and legislative history were all the court had to consider, it would quickly hold that aboriginal title, if any, in the OCS was extinguished. Plainly Congress meant to extinguish aboriginal title as to submerged lands, adopting express references to "offshore . . . fishing rights"; and the legislative history expressly negated a narrow application of this language. As discussed below, the Ninth Circuit Court of Appeals took this view of the matter in *People of Village of Gambell v. Clark*, 746 F.2d 572 (1984) (*Gambell I*).

The opening of Alaska's OCS to offshore drilling for oil spurred debate regarding whether ANCSA extinguished aboriginal claims in the offshore areas outside state territorial jurisdiction (the three-mile territorial sea), but within federal jurisdiction (the OCS and EEZ). The Native villages of Gambell and Stebbins brought suit to enjoin the Department of the Interior from leasing 429 tracts in Norton Sound for oil and gas exploration. The villages claimed that the leasing violated their subsistence rights established under the Alaska National Interest Lands Conservation Act (ANILCA)[13] or, alternatively, violated their aboriginal hunting and fishing rights established under common law. Judge Von Der Heydt of this court found that ANILCA did not apply to the OCS and that the villages had no property rights based on common law in the OCS. The court concluded that the village had no statutory right to harvest fish and game along the

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[13] 16 U.S.C. § 3101, *et seq.* (1994).

OCS. *Village of Gambell v. Watt*, N83-0003-CV, Memorandum and Order (April 4, 1983).[14]

In *Gambell I*, the two Alaska Native village plaintiffs contended that the phrase "in Alaska", as used in section 4(b) of ANCSA, extinguished aboriginal title only within the strict legal boundaries of the State of Alaska. The court found that the phrase "in Alaska" was subject to two meanings; the phrase could refer to either the meaning the plaintiffs argued or it could mean the broader geographic region of Alaska "including the contiguous continental shelf and the waters above it [.]" *Id.* at 574. The court found that the possibility of two meanings rendered the phrase ambiguous and justified reference to the legislative history to determine Congress's intended meaning. Viewing the above-quoted legislative history and additional material,[15] the Ninth Circuit declared that:

> [T]he history of section 4(b) demonstrates that Congress chose to adopt broad language to extinguish all claims made by Alaska Natives based upon aboriginal right, specifically including claims to hunting and fishing rights in offshore waters above the outer continental shelf.

Id. at 578-79. The court held that section 4(b) extinguished aboriginal rights in outer continental shelf waters. *Id.* Also at issue in *Gambell I* was the geographic reach of the ANILCA. ANILCA created rights to subsistence hunt and fish, which, according to the statute, were to apply on "federal public lands." 16 U.S.C. § 3114. The term "public

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[14] This order is attached as Exhibit 6 to plaintiffs' Motion for Partial Summary Judgment. Clerk's Docket No. 35.

[15] *See Gambell I*, 746 F.2d at 575-82.

lands" is defined in ANILCA, as federal "land, waters, and interests therein . . . situated in Alaska." 16 U.S.C. § 3102(1), (2). The court concluded that "in Alaska", as used in the definition of public lands, was an ambiguous term. The court again turned to legislative history of ANILCA. It concluded that Congress intended ANILCA to have the same territorial scope in creating hunting and fishing rights as ANCSA had in extinguishing them. *Gambell I*, 746 F.2d at 580-81. Thus subsistence rights (rights created by statute) were held to exist in the OCS.

A writ of *certiorari* to the Supreme Court was obtained. The Supreme Court reversed the subsistence hunting and fishing holding of *Gambell I* in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987) (*Amoco*).[16] The Court held that the phrase "in Alaska", used in the public lands definition in ANILCA, was capable of precise definition; thus, resort to legislative history was not required. The Court applied the following test in reaching this conclusion:

> "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used." *United States v. Locke*, 471

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[16] While the appeals process for the *Gambell I* case was proceeding, the plaintiff villages sought a preliminary injunction against exploratory activities in Norton Sound. The district court denied the motion. The villages appealed and the Ninth Circuit reversed. *People of Gambell v. Hodel*, 774 F.2d 1414 (1985) (Gambell II). The Supreme Court reversed the issuance of the preliminary injunction in *Amoco* as well. 480 U.S. at 546.

> U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). This is not that "exceptional case" where acceptance of the plain meaning of a word would "thwart the obvious purpose of the statute." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

Amoco, 480 U.S. at 548. The Court held, "[n]othing in the language or structure of ANILCA compels the conclusion that 'in Alaska' means something other than 'in the State of Alaska.' " *Id.* at 549.

The Supreme Court vacated the court of appeals judgment in *Gambell I*, but in so doing stated: "[w]e do not decide here the scope of ANCSA § 4(b)." 480 U.S. at 555. The case was remanded to the Ninth Circuit for a decision in light of this opinion.

In *People of Village of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989) (*Gambell III*), a different panel of the Ninth Circuit than that which decided *Gambell I* concluded that *Amoco* had "undermined much of this court's prior opinion on the ANCSA issue." *Gambell III*, 869 F.2d at 1278. The court stated:

> In *Gambell [I]*, this court believed that the territorial scope of aboriginal claims extinguished by ANCSA, defined by the words "in Alaska," is facially subject to two interpretations. Based on this ambiguity, the court embarked on a detailed scrutiny of the legislative history of ANCSA. It ultimately concluded that ANCSA was intended to extinguish all aboriginal claims, including those pertaining to the OCS.
>
> It is now beyond question that the phrase "in Alaska" is not ambiguous and does not include the OCS. *See Amoco*, 107 S.Ct. at 1405.

> Thus, the *Gambell [I]* court's asserted justification for referring to the legislative history is no longer present.

Gambell III, 869 F.2d at 1278-79 (citations omitted in part). The court concluded that neither the language nor structure of ANCSA as a whole required a finding that "in Alaska" meant something other than "in the State of Alaska." *Id.* at 1280. The court accepted the possibility that aboriginal subsistence rights could attach to the OCS and remanded the issue to the district court to decide whether the plaintiff villages in fact possessed aboriginal subsistence rights to the OCS; whether the drilling activity occurring on the OCS interfered significantly with those rights; and whether the Outer Continental Shelf Lands Act extinguished aboriginal subsistence rights. *Id.*

We shall complete the discussion of the convoluted history of *Gambell* hereinafter, in a different context to which the further developments in *Gambell* are relevant (see text beginning at page 28, *infra*).

Based upon *Gambell III*, aboriginal title in Alaska is extinguished within the territorial boundaries of the State of Alaska by virtue of section 4(b) of ANCSA. Based upon *Gambell III* (and despite the persuasive discussion in *Gambell I*), this court is compelled to hold that ANCSA did not extinguish aboriginal title which may exist in the OCS. Based upon *Tlingit & Haida Indians of Alaska*, such title may include a non-exclusive right to fish.

Ownership of the OCS

The paramountcy cases, in which the federal government and coastal states disputed ownership and control

of the territorial sea and OCS, impact this dispute between the Alaska Native villages and the federal government.

The federal judiciary has long addressed state claims to submerged lands like the OCS. In the first case, *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367 (1842), the Supreme Court followed English common law and ruled that the beds and banks of navigable waters are not privately held but are held by the sovereign for the benefit of the public. The question of which sovereign, the federal or the state, held title was never debated. The Court assumed the states (one of the original thirteen, in the case presented) were the appropriate sovereign because the prerogatives of the English crown passed to them at independence from England. The Court never inquired whether this sovereign prerogative – like the foreign relations power or the interstate commerce power – passed to the federal government upon adoption of the Articles of Confederation or the Constitution.

The Court extended the *Martin* holding in *Pollard's Lessee v. Hagan* when it found that states admitted after the Constitution similarly were vested with sovereign authority over the navigable water bottoms enclosed in their state boundaries. 44 U.S. (3 How.) 212 (1845). The Court required this congruity of treatment under the Equal Footing Doctrine, which provides that newly admitted states enter the Union on equal footing with those existent states.

These early cases all involved claims to inland waters or enclosed bays. Not until the 1940's, with the development of offshore oil well drilling technology, did attention turn to the OCS. Coastal states began asserting claims to the seabed. The federal government, then in the midst of fighting World War II, strongly objected that these claims would weaken national defense. In 1945, President Truman issued an executive proclamation claiming United States' jurisdiction over the OCS. Exec. Proc. 2667, 59 Stat. 884 (1945), *reprinted in* 1949 U.S.C.C.A.N. 1199. One month after this declaration, the federal government invoked the Supreme Court's original jurisdiction and filed suit against California. *United States v. California*, 332 U.S. 19 (1947). The United States requested a declaratory judgment that it, and not the states, owned or, alternatively, had paramount rights in the lands and minerals underlying a three-mile belt of the ocean beginning at the low water mark of the tide. The Court noted:

> The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments,

> always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it.

Id. at 29. The Court found that the federal government had paramount rights and powers in the territorial sea, "an incident to which is full dominion over the resources of the soil under that water area, including oil." *Id.* at 38-39. In reaching this decision, the Court looked at the onus that is on the federal government to defend the nation's shores and to promote international commerce. The Court found that protection and control of the three-mile territorial sea was necessarily a "function of national external sovereignty." *Id.* at 34. Allowing the states to assert ownership to this disputed region would compromise that sovereignty. The Court stated:

> The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. . . . [N]ational interests, responsibilities, and therefore national rights are paramount in waters lying to the seaward in the three-mile belt.

Id. at 35-36.

In *United States v. Louisiana*, 339 U.S. 699 (1950), the Court extended the holding of *California* beyond the three-mile territorial sea and concluded that the United States had paramount rights to the OCS; this decision

extended federal control as far as twenty-seven miles offshore. The Court stated:

> If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so. So far as the issues presented here are concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the ocean and the resources of the soil under that area, including oil.

Id. at 705-06.

In *United States v. Texas*, 339 U.S. 707 (1950), the state presented the slightly different argument that because the state was a separate republic prior to its admission into the Union, the state had power and dominion over its territorial sea and did not cede this to the Union upon its admission as a state. The Court disagreed. It held that the fact a state enters the Union on equal footing with all other states "negatives any implied, special limitation of any of the paramount powers of the United States in favor of a State." *Id.* at 717. Again, the Court stated its belief that federal interests are paramount in contested regions of the sea and seabeds:

> [A]s pointed out in *United States v. California*, once low-water mark is passed the international domain is reached. Property rights must then be

> so subordinated to political rights as in substance to coalesce and unite in the national sovereign. . . . If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it.

Id. at 719. *United States v. Texas* also controls a claim of title separate from one of sovereignty. The Court said that in these instances "property interests are so subordinated to the rights of sovereignty as to follow sovereignty." *Id.* Finally, in *United States v. Maine*, 420 U.S. 515 (1975), the Court extended the holding of the paramountcy cases to the original thirteen states bordering the Atlantic Ocean and held that "as a matter of constitutional law . . . the federal government has paramount rights in the marginal sea." *Id.* at 522-23.

Following *United States v. Louisiana*, which in substance put ownership of the OCS with the federal government, the coastal states turned their attention to the legislative arena to shape this continued conflict between federal and state governments. The result of those efforts was the passage in 1953 of the Submerged Lands Act (SLA)[17] and the Outer Continental Shelf Lands Act (OCSLA).[18] Through the SLA, the federal government declared it to be in the public interest that title to and ownership of "lands beneath navigable waters" rests with the states. 43 U.S.C. § 1311(a). Included in the definition of "lands beneath navigable waters" are lands "seaward

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[17] 43 U.S.C. §§ 1301-1315 (1994).

[18] 43 U.S.C. §§ 1331-1356 (1994 & Supp. 1995).

to a line three geographical miles distant from the coast line of" coastal states. 43 U.S.C. § 1301(a)(2). While the states gained title to the submerged lands in this three-mile territorial sea, the United States retained paramount powers in the waters and submerged lands. Title II, Section 6, of the SLA provides:

> (a) The United States retains all its navigational servitude *and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce,* navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

43 U.S.C. § 1314(a) (emphasis supplied).

While the SLA relinquished federal proprietary title to the submerged lands from coastlines to a distance of three miles offshore, the OCSLA was a congressional reaffirmation of federal control over the OCS extending seaward of the three-mile limit. The act declared:

> (1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;
>
> (2) this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas

> and the right to navigation and fishing therein shall not be affected;
>
> (3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs. . . .

43 U.S.C. § 1332(1)-(3). The OCSLA extended the reach of the Constitution and federal laws to the OCS. 43 U.S.C. § 1333(a).

The OCSLA does provide that:

> Nothing herein contained shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this subchapter and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: *Provided, however,* That nothing herein contained is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact applies to the lands subject to this subchapter. . . .

43 U.S.C. § 1342.

The OCSLA makes no provision for non-statutory property rights that aboriginal people may claim in the OCS.

The Alaska OCS/Aboriginal Title Litigation

Whether aboriginal title attaches to the OCS has been a subject of litigation before this court since the early 1980s. This court first addressed claims of aboriginal title to the OCS in *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *affirmed on grounds other than those here discussed*. 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985). The Inupiat people sued to enjoin the United States from selling oil and gas exploration leases for OCS lands in the Beaufort and Chukchi Seas. In addition to their request for injunctive relief, the plaintiffs sought damages and a declaration of their title to and control over the contested region, which extended over 65 miles offshore. The Inupiat action was one to quiet title, but no assertion of fee simple title was put forward by the plaintiffs. Rather, the plaintiffs claimed they had rights of sovereignty and unextinguished aboriginal title to large portions of the Beaufort and Chukchi Seas; these claims were based upon the plaintiffs' use and occupancy of the seas from time immemorial. In its order, the court referred to plaintiffs' claim of sovereign authority as a claim of "sovereign power" and it referred to plaintiffs' claim of aboriginal title as a "property right".

This court relied on the paramountcy cases discussed above to dismiss plaintiffs' claims of sovereignty and aboriginal title. As to plaintiffs' claim of sovereignty, Judge Fitzgerald held that:

> [C]laims of sovereign power over the oceans whether made by one of the several states in the Union or by the Inupiat or by any other native

> tribe is inconsistent with national sovereignty and must fail.

Id. at 185.

As to claims of both sovereignty and aboriginal title, the court again held the federal government's interest in the OCS outweighed competing interests and stated:

> If, as a matter of constitutional law, the federal government must be possessed of paramount rights in offshore waters, it makes no difference whether the competing domestic claimant is a state or a tribe of American Natives. All are subordinate to the federal government, and neither can, under the Constitution, claim rights which are at odds with those which are of necessity entrusted to the one external sovereign recognized by the Constitution. *United States v. Wheeler,* 435 U.S. 313, 323 (1978). (Indian tribes are "dependent . . . within our territorial jurisdiction" and have no *"freedom to determine external relations."*)

Id. at 187 (parallel citations omitted). The court continued:

> Moreover, the federal government has consistently exercised exclusive jurisdiction and control over the adjacent waters and the seabed on the continental shelf. In the exercise of this jurisdiction, Congress has on occasion enacted statutory provisions permitting certain rights of subsistence for natives. *See e.g.,* [FCMA] 16 U.S.C. §§ 1801-1882 (Indian treaty fishing rights given special recognition). Marine Mammal Protection Act, 16 U.S.C. § 1371(b) (Explicit exemption for native subsistence whaling). The necessary implication is that Congress intended

> to permit use by Alaska natives of subsistence rights only to the extent authorized. *Hence, federal recognition of any sovereign power or property right arising out of subsistence activities would be both inconsistent and illogical.*

Inupiat, 548 F. Supp. at 187 (emphasis added). Finally, as to plaintiffs' claim of aboriginal title alone, the court stated:

> *United States v. Texas*, 339 U.S. at 719, 70 S.Ct. at 924, also controls a claim of title separate from one of sovereignty. The Court said that in these instances " . . . property rights are so subordinated to the rights of sovereignty as to follow sovereignty."

Inupiat, 548 F. Supp. at 186 n.3.

Inupiat paid particular attention to the plaintiffs' claim of tribal sovereignty over the contested region. It noted that plaintiffs were in effect claiming the rights of an independent nation and concluded that the plaintiffs' claims "sweep far too broadly." *Id.* at 187. But the court did not rest its decision on sovereignty claims alone. The court also disposed of plaintiffs' claim of unextinguished aboriginal title (a property right) as evidenced by the above-quoted language. This conclusion is further evidenced by the court's final disposition of plaintiffs' assertion that the United States violated its trust responsibility to the plaintiffs. The court stated:

> The Inupiat also plead their title and sovereignty claims in terms which assert the violation of a trust relationship which they contend exists between themselves and the federal government. . . . This claim also fails. Unless Indian

> money or property is involved, a trust relationship can only arise from a legislative enactment, a treaty, or executive order. *North Slope Borough v. Andrus*, 642 F.2d 589, 612 (D.C. Cir. 1980). . . . Since I have found that the Inupiat have no property rights in the area claimed and no treaty, statute or executive order has been offered to support the claim of a trust relationship, I conclude that the Inupiat's claim of a trust relationship is without foundation.

Id., 548 F. Supp. at 188 (parallel citations omitted).

Finally, the court noted that it was impossible for the Inupiat people to acquire sovereign or title rights over the OCS in the first place. The court stated:

> I conclude as well that the Inupiat people could not have acquired rights to the sea surface, water column and bed in the disputed area prior to 1867 when the United States purchased the area from Russia, for, as the Supreme Court noted in *United States v. California*, as late as 1876 the concept of territorial sovereignty over adjacent seas remained doubtful under international law. 332 U.S. at 31-33. Nor could the Inupiat have acquired those rights after 1867 because once a tribe of American natives is brought within the jurisdiction of the federal government, it loses all elements of external sovereignty including the capacity to acquire sovereignty over or ownership of unclaimed lands. *Montana v. United States*, 450 U.S. 544, *rehearing denied*, 452 U.S. 991; *United States v. Wheeler*, 485 U.S. 313 (1978); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1832); *Johnson v. McIntosh [sic]*, 21 U.S. (8 Wheat) 543 (1823).

Id. at 187 (parallel citations omitted).

The court thus rejected entirely the Inupiat claims to quiet title in the OCS in its favor.[19]

This court next addressed aboriginal claims to the OCS in the *Village of Gambell* decisions, which commenced in this district court in 1983, *sub nom., Village of Gambell v. Watt*, as discussed above. The district court held that plaintiffs' aboriginal rights claim was inconsistent with federal paramountcy and contrary to this court's ruling in *Inupiat*. The court held that, subject to *Inupiat*, the plaintiffs had no property rights in the OCS. As noted above, the Ninth Circuit held in *Gambell I*, 746 F.2d 572 (9th Cir. 1984), that ANCSA extinguished all aboriginal title in the OCS. However, *Gambell I* also held that ANILCA applied to the OCS and that plaintiffs could pursue their statutory claims to protect their subsistence rights in the OCS. The paramountcy issue was mooted because of the power of Congress to legislate as to the OCS.

On remand, after the Supreme Court reversed the Ninth Circuit's decision on the geographic reach of ANILCA in *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987), there was some dispute between the parties about the scope of the rights the plaintiffs were asserting in the contested region. The plaintiffs took

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[19] As set out above, the district court decision in *Inupiat* was affirmed on other grounds. The Ninth Circuit held, without discussing Judge Fitzgerald's conclusions of law, that ANCSA extinguished whatever rights the Inupiat may have had based upon aboriginal title. *Inupiat Community of Arctic Slope*, 746 F.2d at 570. Thus the district court's sovereignty and property rights holdings were not expressly tested on appeal.

pains to assure the court they were not asserting aboriginal title.[20] Noting this, the Ninth circuit in its *Gambell III* opinion was cautious to refer to the plaintiffs' asserted rights as "aboriginal subsistence rights".

After determining that aboriginal subsistence rights (not title) were at issue, the court next addressed whether aboriginal subsistence rights existed in the OCS as a matter of law. It answered this question affirmatively. In so doing, the court expressly addressed the federal defendant's and oil companies' contention that the villages could hold no aboriginal rights in the OCS based on the holding in *Inupiat*. The court held that the *Inupiat* case did

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[20] The *Gambell III* plaintiffs, in their reply brief to the Ninth Circuit, stated:

> The argument that Alaska Natives cannot own the ocean is absolutely correct but totally irrelevant. This case involves claims of aboriginal hunting and fishing rights, not claims of aboriginal title to the ocean. . . .
>
> . . . .
>
> Conceding that we cannot own the ocean does not, however, have any particular relevancy for this litigation. The simple fact is that we have never asserted an ownership claim to the ocean, to the water column composing it, or even to the lands underlying it. As demonstrated by the record, we have merely claimed aboriginal hunting and fishing rights in waters and ice located beyond the territorial boundaries of the State of Alaska.

Gambell III plaintiffs' reply brief, included as an exhibit to defendant's Reply to Plaintiffs' Opposition to Defendant's Cross-Motion for Summary Judgment, Clerk's Docket No. 46, exhibit 12 at 2-4.

not control the question before the court, because plaintiffs in *Gambell III* were not asserting a claim of *sovereign* rights as plaintiffs in *Inupiat* had. *Gambell III*, 869 F.2d at 1276. However, as to the legal doctrine upon which *Inupiat* was founded, the court stated.

> The paramountcy cases stand for the proposition that the national government has "paramount" interests in ocean waters and submerged lands below the low water mark ("adjacent waters"). Any claims of right that are inconsistent with national paramountcy, such as state ownership of the seabed beneath adjacent waters, cannot be recognized. *See, e.g., [United States v.] California*, 322 U.S. [19] at 38-39, 67 S.Ct. at 1668-69. In *Inupiat*, the Natives tried to distinguish the paramountcy cases by limiting them to their facts – a dispute between national and state governments. However, the district court realized that this was a distinction without a difference, and that a claim of sovereignty over adjacent waters, by any party other than the United States, is equally repugnant to the principles set forth in the paramountcy cases. *See Inupiat*, 548 F. Supp. at 185.

Gambell III, 869 F.2d at 1276 (footnote and parallel citations omitted).

The court held that the aboriginal subsistence rights asserted in *Gambell III* (which the court distinguishes from a claim of aboriginal title) may exist "concurrently with a paramount federal interest, without undermining that interest," because it was settled that "federal sovereignty is 'subject to' the Indians' rights of occupancy." *Gambell III*, 869 F.2d at 1277 (citations omitted). The court stated:

> Thus, we reverse the district court and hold that the federal government's paramount interests in the OCS do not extinguish the asserted aboriginal rights of the Villages. That it subordinates those aboriginal rights is certain.

Id.

The court addressed in turn: the defendants' contention that recognizing aboriginal subsistence rights to the contested area was inconsistent with the degree of sovereignty the United States had asserted over the OCS; the defendants' contention that the alleged aboriginal rights of the village were inconsistent with principles of international law; and the issue discussed above of whether ANCSA extinguished plaintiffs' asserted aboriginal subsistence rights to the OCS. The court left open the question of whether the OCSLA extinguished or authorized the extinguishment of aboriginal subsistence rights to the OCS. The court remanded the case to the district court for resolution of three issues:

> 1) whether the Villages in fact possess aboriginal subsistence rights in the OCS, 2) if the Villages do possess such rights, whether the drilling and other activities by the oil companies will interfere significantly with the Villages' exercise of those rights, and 3) whether OCSLA extinguishes aboriginal subsistence rights in the OCS as a matter of law.

Id. at 1280.

On remand before the district court, the plaintiff villages did an about-face on their assurances to the *Gambell III* court and moved to amend their complaint to expressly claim aboriginal title to the OCS, which they

now said was always part of their original claim. Defendants then moved for summary judgment, arguing that the plaintiffs' claim must fail, because they could not show the drilling significantly interfered with the villages' hunting and fishing rights. The plaintiffs responded that a showing of significant interference was not necessary because it is not an element of an aboriginal title claim.

Judge von der Heydt of this court denied the villages' motion to amend and granted the defendants' summary judgment request. *Village of Gambell v. Lujan*, No. A85-0184-CV, Memorandum and Order (Sept. 20, 1991).[21] In doing so, the court also noted that the Ninth Circuit in *Gambell III* had not used the well-established term "aboriginal title." *Id.* at 8. Judge von der Heydt further found that the district court had originally decided the decision on property rights in the OCS (which the court understood an assertion of aboriginal title to be) against plaintiffs. He stated that only aboriginal subsistence rights to hunt and fish were at issue on appeal. *Id.* The court granted the defendant's summary judgment motion because the plaintiffs could not evidence that drilling activities significantly interfered with their hunting and fishing rights. The plaintiffs appealed this ruling and the denial of their motion to remand.

The Ninth Circuit addressed the *Gambell* claim for the fourth time in *Village of Gambell v. Babbitt*, 999 F.2d 403 (9th Cir. 1993) (*Gambell IV*). The court affirmed the grant

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[21] This order is attached as Exhibit 8 to plaintiffs' Motion for Partial Summary Judgment. Clerk's Docket No. 35.

of summary judgment for the defendants, but on the different ground that the plaintiffs' claim for relief was now moot because no oil and gas leases were going to issue. *Id.* at 406. The *Gambell* plaintiffs attempted to keep the case ripe by arguing that there remained a continuing dispute between the parties over property rights to the OCS. The plaintiffs relied on the Supreme Court's decision in *United States v. Alaska*, 503 U.S. 569 (1992). That case involved a dispute over the federal-state boundary in Norton Sound. The Court found a continuing controversy between the state and the federal government over the territorial sovereignty of submerged lands even after the issue originally prompting litigation dissolved. The *Gambell IV* court distinguished that case, stating:

> Unlike the State of Alaska in the case cited, the appellants Native Villages do not assert sovereign rights as against the United States. As we recognized in *Gambell III*, such a claim would necessarily fail as inconsistent with principles of national paramountcy. 869 F.2d at 1276 & n.3 (citing *United States v. California*, 332 U.S. 19 (1947); *Inupiat Community of the Arctic Slope v. United States*, 548 F. Supp. 182 (D. Alaska 1982), *aff'd on other grounds*, 746 F.2d 570 (9th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985). Consequently, there is no continuing dispute over sovereign power in this case.

Gambell IV, 999 F.2d at 407 (parallel citations omitted). The court next concluded that the *Gambell* cases never presented a dispute over property rights:

> Nor, as this case is presented to us, do we find any concrete, continuing controversy over property rights presented in a form capable of

> present judicial resolution. The Villages continuously have urged before us their claims to aboriginal hunting and fishing rights, but the only actions of the federal government thus far urged to be inconsistent with those rights were those connected with Lease Sale 57. That controversy is over. This litigation has never been presented to us as a quiet-title action, and we will not permit it to be recast into that form at this late date.

Id. at 407.

Finally, as to Alaska paramountcy cases, in *Nome Eskimo Community v. Babbitt*, 67 F.3d 813 (9th Cir. 1995), Alaska Natives sought declaratory relief that they held aboriginal rights to use, occupy, possess, hunt, fish, and exploit the waters, ice, and mineral resources within their respective traditional use areas of the OCS. This was a claim of aboriginal title. The plaintiffs sought a declaration that gold leasing on the OCS conducted by DOI in Norton Sound violated their aboriginal title and requested an injunction against further gold leasing without plaintiff's consent. The day after the plaintiffs' complaint was filed, federal defendants canceled the lease sale for lack of bids. The federal defendant moved to dismiss the plaintiffs' complaint for lack of jurisdiction, asserting that plaintiffs' claim was moot and arguing alternatively that *Inupiat Community of Arctic Slope* already held that claims of aboriginal title are inconsistent with federal paramount interests in the OCS. The plaintiffs argued that the case was not moot and moved for summary judgment in their favor. They also replied that *Inupiat* was a case to establish absolute fee or sovereign title, and thus should not guide the court's analysis

because *Nome Community* was a case about aboriginal title.

This court ruled that plaintiffs' claim was moot, but, alternatively, reached the merits. *Nome Eskimo Community v. Babbitt,* No. A91-0338-CV, Memorandum and Order (June 8, 1995).[22] The court characterized plaintiffs' claim as one of aboriginal title and found there is no aboriginal title in the OCS. The court found the *Inupiat* resolved this issue long ago and that the district court there understood that the plaintiffs were seeking a declaration of unextinguished aboriginal title which accompanied the sovereign rights claim. The court found that *Gambell III* addressed only the issue of aboriginal hunting and fishing rights, not aboriginal title. It concluded that because aboriginal title and sovereignty claims go hand in hand, any claim of aboriginal title over the OCS was inconsistent with federal paramount interests and must fail.

The plaintiffs appealed. The Ninth Circuit upheld the grant of summary judgment in defendants' favor on mootness grounds. *Nome Eskimo Community,* 67 F.3d at 816 (9th Cir. 1995). It vacated the district court substantive decision, holding that:

> The [district court] correctly decided that the case was moot, and, probably to avoid needless relitigation if we reversed the mootness determination, also held that aboriginal title was subordinate to federal paramount title. We must vacate that substantive determination, without intimating any view on whether it was correct,

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[22] This order is attached as Exhibit 9 to plaintiffs' Motion for Partial Summary Judgment. Clerk's Docket No. 35.

> because mootness precluded the exercise of judicial power. *Native Village of Noatak*, 38 F.3d at 1509. It might be desirable, from a practical standpoint, to have some authoritatives resolution of the aboriginal claims to rights in the outer continental shield. The likely expense of responding to litigation may thwart socially worthwhile activity which the government properly seeks to facilitate. But without a "case," a federal court lacks jurisdiction to perform that task.

Id. at 816.

The issue of aboriginal title in the OCS of Alaska is now before the court in the form of plaintiff's claim that DOC fisheries regulations constitute "trespass upon plaintiffs' aboriginal territories on the OCS."[23] As relief, plaintiffs seek a declaration that "plaintiffs hold aboriginal title and exclusive rights to . . . fish . . . within their traditional use areas of the OCS. . . . "[24]

DECISION AND CONCLUSION

If states of the federal republic of the United States have no property rights in the OCS, can it be otherwise for a tribal entity which, even if possessed of sovereign rights, is dependent upon the United States in the same manner as a state for such matters as national defense, foreign affairs, and world commerce? Clearly not. A tribe is at least as dependent on the federal government in the OCS as are states of the United States. On the basis of

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[23] Clerk's Docket No. 60 at 9, ¶ 25.

[24] *Id.* at 10.

national defense, foreign affairs, and world commerce, the United States Supreme Court has deprived states of title in the OCS. *United States v. Louisiana*, 339 U.S. 699 (1950). For the same reasons that states do not have title to the OCS, tribes do not have title to the OCS either. It is literally true that Indian tribes existed and governed in North America before the United States came into existence, but the same is true for the states. They existed as sovereign entities before the creation of the United States under the Constitution of 1789, yet these states have no ownership in the OCS. *United States v. Maine*, 420 U.S. 515 (1975). Again, if states which predated the Constitution have no such rights, tribes cannot have ownership rights in the OCS either. The Ninth Circuit Court of Appeals recognized this proposition in *dicta* in *Gambell III*, as quoted above.[25] This court does not understand the decision in *Amoco* to undercut the foregoing proposition in any respect.

To the extent that plaintiffs' complaint is founded upon territorial or aboriginal title claims (as opposed to mere occupancy) in the OCS, and to the extent that plaintiffs contend that such interests have been trespassed upon by the DOC, those claims are now rejected. The paramountcy cases stand for the proposition that territorial or title claims are inconsistent with the sovereignty of the federal government as to the OCS. Therefore, plaintiffs' trespass claim – Count I of plaintiffs' second amended complaint – is dismissed.

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[25] *Gambell III*, 869 F.2d at 1276.

Moreover, in taking the foregoing action, the court expressly rejects plaintiffs' claim of an *exclusive* right to fish the OCS. *Tlingit & Haida Indians* disposed of this legal question long ago when it held that there is no exclusive right to fish that is vested in Native Americans just because tribes have established aboriginal title to adjacent lands. *Tlingit & Haida Indians of Alaska v. United States*, 389 F.2d 778, 785 (*citing United States v. Winans*, 198 U.S. 371 (1905)).

Plaintiffs argue that *Tlingit & Haida Indians* is not dispositive here because the issue before that court was whether loss of an exclusive right to fish was a compensable property interest, not whether exclusive aboriginal fishing rights existed in the first place. Plaintiffs understate the reach of that case's holding. The claims court in *Tlingit & Haida Indians* had already determined that the tribes had established aboriginal determined that the tribes had established aboriginal title to six areas in Southeast Alaska. The Act of June 19, 1935 (49 Stat. 388), gave the claims court jurisdiction to provide equitable and just compensation for the taking of lands and interests subject to aboriginal title Plaintiffs had argued that the government had failed to protect their right to an exclusive fishery when it allowed a common fishery to come into existence on the navigable waters adjacent to the lands where plaintiffs had established aboriginal title. The court denied this claim, not because a right to fish is not a vested property interest, but because right to an *exclusive* fishery based upon aboriginal ownership of land does not exist. *Tlingit & Haida Indians*, 389 F.2d at 785 ("The right to fish in navigable water[]s and reduce . . . fish to possession is not a concomitant of aboriginal

title to adjacent land" [p. 786]; "[t]here are no exclusive rights to fish in Indians[]" [p. 785]; [t]here is no aboriginal right based on occupancy and use which gives the plaintiffs title to the fish or an exclusive right to remove all fish[]" [p. 788].).

That holding applies here. Quite apart from the aboriginal title issue, plaintiffs cannot claim an exclusive right to fish for halibut and sablefish. Exclusive rights to fish in navigable waters in the hands of Alaska Natives would require recognition by treaty or congressional statute. *Id.* at 785; *Confederated Tribes of Chehalis*, 96 F.3d at 341. Absent this recognition, plaintiffs cannot claim that the right to fish for halibut and sablefish is theirs exclusively.[26] As to those claims, plaintiffs' motion for partial summary judgment is denied, and defendant's motion for partial summary judgment is granted.

All that remains are DOC'S contentions that whatever aboriginal rights the plaintiffs may hold in the waters in question were expressly extinguished by charters of the Russian American Company or impliedly extinguished by the OCSLA. DOC makes the novel argument that Russia extinguished plaintiffs' aboriginal right to engage in a commercial fishery on the OCS and EEZ when the Russian American Company was granted its 1821 and 1844 Charters. The charters provided that the Chugach Indians could engage in subsistence fisheries on their shores, but were precluded from engaging in commercial activities without the permission of the Russian

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[26] The question of plaintiffs' non-exclusive fishing rights, if any, in the OCS will be taken up after further briefing by the parties.

American Company. The 1844 Charter also granted the Russian American Company the right to hunt and fish to the exclusion of all other Russian subjects; included in the definition of Russian subjects are the Chugach. The defendant requests this court to find that where a prior sovereign extinguishes aboriginal rights, those rights remain extinguished (citing this court to *Lipan Apache Tribe v. United States*, 180 Ct.Cl. 487 (1967); *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 642 (9th Cir. 1986)).

The defendant's argument must fail. It is settled law that the Treaty of Cession of 1867 between the United States and Russia did not extinguish aboriginal rights. *Tlingit & Haida Indians v. United States*, 177 F.2d 452, 463-64 (Ct. Cl. 1959); *see also Edwardsen v. Morton*, 369 F. Supp. 1359, 1363 (D.D.C. 1973) (providing history of aboriginal claims in Alaska). If the Treaty of Cession, an act of the Russian government, did not extinguish aboriginal rights, then charters of a private trading company issued twenty to forty years before the treaty could not have extinguished aboriginal rights. Even if these charters were acts of the Russian government, they are insufficiently specific to extinguish what remaining aboriginal rights the plaintiffs assert to fish in the contested region. DOC's request for summary judgment on this ground is denied.

DOC last argues that the OCSLA impliedly extinguished plaintiffs' aboriginal title or its remaining aboriginal rights in the OCS. The court need not address the aboriginal title arm of this contention, for it is here decided on other grounds in favor of the DOC. The court has also above addressed the plaintiffs' claim of an exclusive aboriginal right to fish in the waters above the OCS.

DOC argues that the OCSLA is an act of Congress to assert complete dominion over the OCS in a manner that is adverse to any remaining aboriginal fishing right in the waters above the OCS. The key problem with DOC's argument is that the OCSLA has nothing to do with fish. As quoted at length above, the OCSLA is to be "construed in such a manner that . . . the right to navigation and fishing therein shall not be affected. . . . " 43 U.S.C. § 1332(2). The extinguishment of aboriginal rights is not to be lightly implied. *Onedia II*, 470 U.S. at 248; *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. at 354. The OCSLA, an act governing extraction of minerals, did not extinguish all possible non-exclusive aboriginal rights to fish.[27]

In conclusion, the paramountcy case law precludes recognition of aboriginal title to the OCS. There is no exclusive right to fisheries in Alaska Natives. A non-exclusive right, if proved, may or may not in fact conflict

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[27] The district court in *United States v. Michigan*, 471 F. Supp. 192, reached a similar decision regarding the SLA. Amicus in that case argued that Congress impliedly abrogated the Indians' treaty fishing rights by passage of the SLA, which rested title to submerged lands beneath navigable waters with the states. The court held that the SLA did not implicate tribal fishing rights either expressly or impliedly. It noted that the impetus to the act was the paramountcy cases' holdings that offshore oil reserves belonged to the federal government rather than the individual states. It noted that while the definition of natural resources in the OCS included fish, the act was aimed primarily at managing oil and gas reserves. The court concluded by noting that the strict standard used to determine whether a federal statute abrogated a treaty right required the court to hold that the Submerged Lands Act did not extinguish plaintiffs' treaty protected right to fish. *Id.* at 274-76.

with federal paramount interest of promoting and managing foreign commerce. Neither the OCSLA nor the Russian American Charters extinguish aboriginal subsistence fishing rights, if any, held by plaintiffs.

Plaintiffs' motion for partial summary judgment is denied. Defendant's motion for summary judgment is granted as to Count I of plaintiffs' second amended complaint.

DATED at Anchorage, Alaska, this 17 day of June, 1997.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF EYAK; NATIVE VILLAGE OF TITITLEK; NATIVE VILLAGE OF CHANEGA (AKA CHENEGA); NATIVE VILLAGE OF NANWALEK; NATIVE VILLAGE OF PORT GRAHAM, Plaintiffs-Appellants, v. TRAWLER DIANE MARIE, INC.; WILLIAM DALEY, Secretary of Commerce, Defendants-Appellees.	No. 97-35944 D.C. No. CV-95-0063-HRH ORDER

(Filed Dec. 7, 1998)

Before: FARRIS, O'SCANNLAIN, and HAWKINS, Circuit Judges.

The panel has voted to deny Plaintiffs-Appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, AS AMENDED,

16 U.S.C. § 1801 *et seq.*, §§ 1854(a)(3) and 1854(c)(1).
April 13, 1976, 90 Stat. 331 Pub L. 94-265.

§ 1854. Action by Secretary

(a) Review of plans

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall –

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provision of this chapter, and any other applicable law; and

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published.

(2) In undertaking the review required under paragraph (1), the Secretary shall –

(A) take into account the information, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea and to fishery

access adjustments referred to in section 1853(a)(6) of this title.

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify –

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

(c) Preparation by Secretary

(1) The Secretary may prepare a fishery management plan, with respect to any fisher, or any amendment to any such plan, in accordance with the national standards, the other provisions of this chapter, and any other applicable law, if –

(A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management; or

(B) the Secretary disapproves or partially disapproves any such plan or amendment, or disapproves a revised plan or amendment, and the Council involved fails to submit a revised or further revised plan or amendment, as the case may be.

In preparing any such plan or amendment, the Secretary shall consult with the Secretary of State with respect to foreign fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea. The Secretary shall also prepare such proposed regulations as he deems necessary or appropriate to carry out each plan or amendment prepared by him under this paragraph.

THE OUTER CONTINENTAL SHELF LANDS ACT OF 1953

43 U.S.C. 1331 *et seq.*, § 1342.
Aug. 7, 1953, c. 345, § 14, 67 Stat. 470.

§ 1342. Prior claims as unaffected.

Nothing herein contained shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this subchapter and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: *Provided, however,* That nothing herein contained is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact applies to the lands subject to this subchapter or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything herein contained.

THE SUBMERGED LANDS ACT OF 1953

43 U.S.C. 1301 *et seq.*, § 1315.
May 22, 1953, c. 1953, c. 65, Title II § 8, 67 Stat. 32.

§ 1315. Rights acquired under laws of the United States unaffected

Nothing contained in this subchapter or subchapter I of this chapter shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this subchapter or subchapter I of this chapter and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: *Provided, however,* That nothing contained in this subchapter or subchapter I of this chapter is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this subchapter, or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything contained in this subchapter or subchapter I of this chapter.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE CANADIAN ST. REGIS BAND OF MOHAWK INDIANS (Mohawks of Akwesasne),

Plaintiff,

-v-

THE STATE OF NEW YORK, et al.,

Defendants.

82-CV-783
82-CV-1114

THE ST. REGIS MOHAWK TRIBE, et al.,

Plaintiffs,

-v-

THE STATE OF NEW YORK, et al.,

Defendants.

89-CV-829

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NEAL P. McCURN, C.J.

MEMORANDUM-DECISION AND ORDER

(Filed Oct. 28, 1998)

The United States has moved to intervene as of right as plaintiff in this action pursuant to Rule 24 of the Federal Rules of Civil Procedure. The plaintiffs "fully support" this motion to intervene by the United States. Letter from Attorneys Tullberg, Walker, and Sachse to Court of 8/18/98 at 1. The defendants, with the exception of the State of New York, are "tak[ing] no position" with

respect to this motion to intervene.[1] Farr Letter. The State of New York opposes this motion.

After carefully considering the United States' Memorandum in Support of its Motion to Intervene, the State's Memorandum in Opposition, and the United States' Reply Memorandum, and after reviewing the applicable law, the court hereby

ORDERS that insofar as the United States is seeking to intervene as of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, such relief is GRANTED.

Furthermore, even if the court were inclined to deny the motion to intervene as of right by the United States, it would, nonetheless, GRANT the United States' motion seeking permissive intervention pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

DATED: October 27, 1998
Syracuse, New York

/s/ Neal P. McCurn
Neal P. McCurn
Senior U.S. District Judge

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[1] The defendants have made clear, however, that by taking no position with respect to this motion to intervene, they are "not waiv[ing] and . . . [are] expressly preserv[ing] the right to raise, with respect to the Mohawks of Akwesasne and the People of the Longhouse at Akwesasne, the issues of standing[,] the lack of a trust relationship between these tribes and that United States and that these tribes are not federally recognized." Letter from Attorney Farr to Court of 9/28/98 ("Farr Letter").